

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1005**

State of Minnesota,
Respondent,

vs.

Adam Lee Bush,
Appellant.

**Filed July 12, 2021
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Becker County District Court
File No. 03-CR-18-1074

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from final judgments of conviction for first-degree criminal sexual conduct, appellant Adam Lee Bush argues that his convictions must be reversed because (1) respondent State of Minnesota elicited improper vouching testimony that

impacted his substantial rights, (2) the district court deprived him of his right to counsel when it denied him a continuance to obtain new counsel, and (3) the district court should have granted his request for an instruction on a lesser-included offense of second-degree criminal sexual conduct. Alternatively, Bush argues—and the state agrees—that, under Minn. Stat. § 609.04, subd. 1 (2020), the district court erred by entering convictions and sentences for two counts of first-degree criminal sexual conduct because the offenses arose out of the same behavioral incident.

We conclude that, even if the prosecutor plainly erred by eliciting improper vouching testimony, the error did not affect Bush’s substantial rights. We also conclude that the district court did not violate Bush’s right to counsel by denying a continuance and did not err by denying a lesser-included-offense instruction. We agree with the parties that Bush should be convicted and sentenced for only one count of first-degree criminal sexual conduct. We therefore affirm in part, reverse in part, and remand for the district court to correct the warrant of commitment to vacate one of his criminal-sexual-conduct convictions.

FACTS

The following facts are drawn from Bush’s pretrial hearing and jury trial. Bush and his former wife, K.B., were married in 2011, and they had two children together. K.B. has a daughter from a previous relationship (the child), who also lived with Bush and K.B. In February 2016, the child and the other two children were placed in non-relative foster care when Becker County initiated a child-protection case. In December 2016, Bush’s and K.B.’s parental rights were terminated and all three children were placed in relative foster

care with their current adoptive parents. Bush and K.B. divorced, and Bush moved to Wisconsin and remarried.

One evening in April 2018, more than two years after being removed from her mother's and Bush's home, the child started crying and ultimately confided in her then-foster (and now adoptive) mother that Bush had sexually abused her prior to her removal from his care. The foster mother reported the child's disclosure to the county adoption worker, and the child was brought to the Red River Children's Advocacy Center for a forensic interview. The child was nine years old at the time of the interview. The child gave detailed descriptions of sexual abuse by Bush, which she said took place in the family's home while K.B. was at work. The child was between five and seven years of age at the time of the abuse.

The Detroit Lakes Police Department investigated. Police confirmed that, when the child was living with K.B. and Bush, K.B. was working several jobs, including during the evenings, and that Bush would stay home with the children. The state charged Bush with two counts of first-degree criminal sexual conduct.

The day before his jury trial began in March 2020, Bush requested a continuance to obtain new counsel. Bush explained that he was dissatisfied with his counsel's performance during pretrial evidentiary motions and that his counsel was not responsive to his phone calls. Bush's counsel told the district court that he had "an ethical conflict" and that he did not feel like he could represent Bush any longer. Upon questioning from the district court, though, counsel confirmed that Bush was terminating him, not that he was voluntarily withdrawing over an ethical conflict. The district court determined that Bush did not have

a reasonable basis for dissatisfaction with his counsel, that Bush had terminated his counsel, and that Bush would proceed pro se and that, with the agreement of Bush, his attorney would act as standby counsel. The district court denied Bush's continuance request.

During the three-day jury trial, the state presented testimony from several witnesses, including the forensic interviewer, an expert on child sexual abuse, the Detroit Lakes Police Department investigator, K.B., the child, and the child's adoptive mother. Bush testified in his defense.

In her testimony, the child stated that Bush made her "take off [her] clothes and sit on top of him." She testified that he touched "[her] lower" and that he made her "put [her] mouth on his part." She said that this happened more than once.

When the forensic interviewer testified, the state elicited testimony about "what sort of things . . . [she] look[s] for to assess the reliability of [a] child's statements or disclosures." The forensic interviewer replied that there are a lot of different factors, including whether the child is demonstrating that they understand the rules of the interview—that is, that they tell the interviewer when they do not know something or correct the interviewer if the interviewer gets something wrong; the level of detail that the child provides; whether the child makes spontaneous statements; the sensory information provided by the child, such as things they felt, heard, or saw; the child's ability to provide context; what was happening before, during, and after the incident; the consistency of the child's description of events within the interview and with other reports; whether a child is using her own language; and whether the child displays knowledge when there is no

explanation why they would have that knowledge. Without objection by Bush, the forensic interviewer was asked about false reporting and testified that false reporting in a forensic interview is rare.

The state then introduced into evidence the child's videotaped forensic interview as well as a picture depicting the abuse that the child drew during the interview. The jury watched the 80-minute interview. Afterwards, the state asked the forensic interviewer—without objection by Bush—whether she observed the child display any of the credibility-assessment factors that the interviewer had previously described. In response, the forensic interviewer thoroughly explained how the child met each factor during the interview.

During cross-examination, defense counsel questioned the forensic interviewer regarding her knowledge of any psychological or mental-health problems that the child might have had at the time of the interview. Defense counsel also asked about false reporting. On redirect examination, the state asked, without objection, “[Defense counsel] asked you about credibility. In your vast training and experience, were [the child's] disclosures credible?” The interviewer testified, “Yes, I believe her disclosure was credible.”

The state's expert on child sexual abuse testified generally about the characteristics of child-sexual-abuse cases. Without objection from Bush, the expert was asked about what her research and experience had shown about false reports of sexual abuse. The expert stated that “false reports are very rare in childhood sexual abuse cases.”

In closing argument, the prosecutor stated to the jury regarding the forensic interviewer's testimony, "Then on redirect, I asked her the ultimate question: Did you believe [the child's] disclosure was credible. She said yes."

The jury found Bush guilty of both counts of first-degree criminal sexual conduct. The district court sentenced him to concurrent executed terms of 156 months.

Bush appeals.

DECISION

I. Any elicitation of improper vouching testimony does not warrant a new trial.

Bush argues that he is entitled to a new trial because the state improperly elicited testimony from the forensic interviewer and the child-sexual-abuse expert that impermissibly vouched for the child's credibility. Bush identifies three instances of improper vouching testimony: (1) the testimony from the forensic interviewer and from the child-sexual-abuse expert that false reports of sexual abuse are rare, (2) the testimony from the forensic interviewer that she believed the child's disclosure was credible, and (3) the testimony from the forensic interviewer that the child's recounting of events during the interview satisfied the credibility-assessment factors.

As an initial matter, the parties disagree on the standard of review that applies to this issue. The state argues that the appropriate standard is the plain-error test that applies to the admission of unobjected-to testimony. Bush argues that the appropriate standard is the modified plain-error test that applies to unobjected-to prosecutorial misconduct. Bush frames the issue on appeal as whether the prosecutor improperly elicited plainly inadmissible testimony, not whether the district court erred by admitting the testimony.

Because eliciting plainly inadmissible testimony may constitute prosecutorial misconduct, *see State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007), the modified plain-error test therefore applies, *see State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Under the modified plain-error test, the appellant bears the burden of establishing an error that is plain. *Id.* An error is plain when it is “clear or obvious,” meaning the error “contravenes case law, a rule, or a standard of conduct.” *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010). If the appellant establishes plain error, “the burden shifts to the [s]tate to demonstrate that the plain error did not affect the [appellant]’s substantial rights.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). At this step, the state must show 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.” *Ramey*, 721 N.W.2d at 302 (quotations omitted). If the state fails in its burden, a new trial may be ordered if appropriate to ensure the fairness and integrity of judicial proceedings. *Id.* at 302-03.

Bush argues that the state improperly elicited vouching testimony. Vouching occurs when a witness testifies regarding another witness’s credibility. *Van Buren v. State*, 556 N.W.2d 548, 551-52 (Minn. 1996). Generally, expert testimony regarding the credibility of a witness is impermissible. *State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984). The reason is that, for “most crimes, the credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility.” *Id.* But the nature of sexual abuse of children “places lay jurors at a disadvantage” because their common experience may not be adequate to assess the

credibility of a child who alleges sexual abuse. *Id.* at 610. Some expert testimony regarding a child's credibility may therefore be appropriate. *Id.*

We turn to the challenged testimony in this case. Bush argues, and the state concedes, that the testimony from the forensic examiner and the child-sexual-abuse expert about the rarity of false reports was plainly inadmissible. The parties cite to this court's decision in *State v. Oslund*, which held that the admission of an expert's testimony that less than two percent of sexual-abuse allegations are fabricated was harmless error. 469 N.W.2d 489, 496 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). Next, regarding the forensic examiner's testimony that she believed the child's disclosure was credible, Bush argues that this opinion testimony was inadmissible under cases including *State v. Miller*, where this court concluded that testimony from a school counselor that he believed a 12-year-old child's report of sexual abuse was inadmissible vouching testimony. 377 N.W.2d 506, 507-08 (Minn. App. 1985). The state counters that the opinion testimony here was not inadmissible because it refuted defense counsel's suggestion on cross-examination that the child's statements should not be given credence because the interviewer had not ruled out that the statements were the product of mental-health problems. The state contends that the testimony was therefore permissible under *Myers*, where the supreme court concluded that an expert's testimony that a child was truthful was permitted to rebut evidence that the child's mother did not believe the child for several months. 359 N.W.2d at 611-12. Finally, regarding the forensic interviewer's testimony concerning the credibility-assessment factors, Bush acknowledges that the expert's testimony identifying and explaining the factors was admissible but asserts that the interviewer's testimony that the child's interview

in fact satisfied those factors was plainly inadmissible under this court's decision in *State v. Morales-Mulato*, 744 N.W.2d 679, 690 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). The state responds that the testimony was admissible to address the defense's theme that the child had mental-health issues that cast doubt on the credibility of her report.

We need not decide whether the prosecution plainly erred by eliciting any of the testimony challenged by Bush if the state has carried its burden of demonstrating that any error did not affect Bush's substantial rights. We therefore begin with that question. To determine whether plainly erroneous prosecutorial misconduct affected a defendant's substantial rights, appellate courts consider various factors, including "the pervasiveness of improper suggestions and the strength of evidence against the defendant." *Parker*, 901 N.W.2d at 926 (quotations omitted). Appellate courts also consider the mitigating effect of the district court's jury instructions. *State v. Trimble*, 371 N.W.2d 921, 926-27 (Minn. App. 1985), *review denied* (Minn. Oct 11, 1985).

The testimony regarding the low incidence of false reports of sexual abuse was not pervasive. Although both the forensic interviewer and the child-sexual-abuse expert testified to the issue, their testimony was brief and was not repeated during closing argument.

The forensic interviewer's testimony that she thought the child's disclosures were credible was even briefer—it was one statement at the end of redirect examination. However, the state repeated the statement during closing argument. Bush argues that this testimony was unfairly prejudicial, relying particularly on our decision in *Miller*, 377

N.W.2d 506. In *Miller*, we held that objected-to testimony from the school counselor, who was a psychologist, that the child's report was credible and that he believed her was reversible error. *Id.* at 509. We reasoned that, because the case turned on the child's credibility and there were some inconsistencies in her testimony, the counselor's opinion, "as an apparent expert, may well have decided the verdict." *Id.* But *Miller* is distinguishable from this case. Here, unlike in *Miller*, the child's trial testimony was internally consistent and was consistent with her forensic interview. The challenged statement here was not likely to have had the same prejudicial effect as the objected-to testimony in *Miller*.

The forensic interviewer's testimony that the child met the credibility criteria was more pervasive; it spanned several pages of the trial transcript. The testimony was not, however, repeated during closing argument. Although this testimony was more extensive than the other challenged testimony, we are persuaded by the state's argument that that fact does not demonstrate an effect on Bush's substantial rights.

The state points to two decisions of this court rejecting the argument that the admission of this type of testimony was reversible error. In *State v. Wembley*, we affirmed the appellant's conviction for sexual abuse of a child despite the erroneous admission of expert testimony that the child met the credibility-assessment factors. 712 N.W.2d 783, 792 (Minn. App. 2006), *aff'd on other grounds*, 728 N.W.2d 243, 245 (Minn. 2007). We reasoned that the jurors heard admissible testimony about the factors that the expert used to assess credibility, watched the interview, and then could judge for themselves whether the child satisfied the factors. *Id.* We explained that, "[d]istilled to its essence, [the] expert testimony provided the jury with very little that the jury could not ascertain independently

from considering the nonexpert evidence introduced at trial.” *Id.* Similarly, in *Morales-Mulato*, we affirmed the appellant’s conviction for sexual abuse of a child although an expert witness testified to the details of the interview that satisfied the expert’s credibility-assessment factors and gave her opinion that the child had been sexually abused. 744 N.W.2d at 690. We concluded that the verdict was “surely not attributable” to the improper testimony, again reasoning that the jury, having learned about the credibility-assessment factors and having watched the videotaped interview, could “judge for itself” whether the child’s statements satisfied the factors. *Id.*

Like in *Wembley* and *Morales-Mulato*, here, the jury watched the child’s videotaped interview. The jury could determine for itself the extent and depth of the content that the child described. The jury could determine whether the child was consistent in her statements and in her connection of her verbal description of events with the drawing that she made. The jury could also decide whether the child provided contextual details suggesting that she actually experienced the events that she described. Moreover, the jury could see and hear the child and could assess her affect and body language. The jury was able to compare all that they saw and heard in the videotaped interview with what they saw and heard during the child’s trial testimony. As in *Wembley* and *Morales-Mulato*, the jury could decide for itself whether the child’s statements were credible.

In addition, the state’s evidence in this case was strong. The videotaped forensic interview of the child provided compelling evidence of Bush’s guilt. The child gave a first-hand account of Bush’s sexual misconduct. The child described in detail the acts that Bush committed against her and made a drawing showing how Bush would make her sit on top

of him without her clothes on. The child's statements during the interview were consistent. Moreover, the child gave trial testimony that was both internally consistent and consistent with her forensic interview.

The circumstances surrounding the child's initial disclosure further strengthened the state's case. The child spontaneously disclosed the alleged sexual abuse to her adoptive mother. The child's adoptive mother testified that, as part of her foster-parent training, she was advised on several different occasions to not ask the children questions about any past sexual abuse and that the child disclosed the sexual abuse unprompted.

The state's case was also strengthened by the police's corroboration of the child's statements regarding the opportunity that Bush had to sexually abuse the child. When the child disclosed the abuse, she recalled that it happened while K.B. was working at a convenience store and that most of the abuse occurred during the night. The police investigator testified that his investigation confirmed that, during the time of the abuse, K.B. was working at the store and often worked past 10 p.m.

Bush argued to the jury that K.B. "brainwashed" the child to allege sexual abuse as K.B.'s way of "getting back" at him for separating from her. But Bush does not point to any evidence supporting his theory. The child disclosed the abuse more than two years after it occurred and long after she was no longer living with K.B. or with Bush. By the time the child disclosed the abuse, Bush was remarried and living in Wisconsin. Because Bush testified, the jury had the opportunity to evaluate his credibility, and it rejected his assertion that the child's disclosures were prompted by K.B.

Bush contends that the evidence in this case is not strong because there was no physical evidence, no witnesses to the abuse, and no contemporaneous reports of suspicious behavior. It is true that those things are not present in the record. Nevertheless, based on the child's trial testimony, her prior consistent testimony, the spontaneity of the reporting, the circumstances surrounding her disclosure, and the lack of motive for her to lie, we conclude that the state's evidence is strong.

Finally, the district court instructed the jurors that an expert's opinion is not entitled to any greater weight than the testimony of any other witness and that they are the sole judges of whether a witness is to be believed. Taking into account all of the circumstances, including the extent of the challenged testimony, the strength of the state's evidence, and the instructions given the jury, we conclude that the state has met its burden of showing that any plain error in eliciting vouching testimony from the experts did not affect Bush's substantial rights.

II. The district court did not deprive Bush of his right to counsel.

Bush argues that the district court violated his right to counsel "who was not operating under a conflict of interest" when it denied his request for a continuance to obtain new counsel and directed that his counsel would act as standby counsel.

Bush argues that, under *United States v. Gonzalez-Lopez*, the district court deprived him of his right to counsel of his choice. 548 U.S. 140, 126 S. Ct. 2557 (2006). But *Gonzalez-Lopez* is factually inapposite. In *Gonzalez-Lopez*, the Supreme Court held that the district court deprived the defendant of his right to counsel of choice by erroneously denying his retained out-of-state attorney's request for admission pro hac vice. *Id.* at 548

U.S. at 144, 126 S. Ct. at 2561. Here, the district court did not deprive Bush of counsel; rather, Bush terminated his counsel. At a pretrial hearing, the district court informed Bush that it had learned that Bush intended to terminate his counsel and asked him if that was correct. Bush said it was correct. The district court asked Bush why he no longer wanted to proceed with his lawyer. Bush replied, “[T]here was things that I wanted him to mention and put into the report that hasn’t—he hasn’t did that, so that is why I was—I don’t feel comfortable going in with him right now.” The district court asked whether Bush’s termination was over “differences of strategy on the case,” and Bush agreed that it was. The district court determined that Bush freely and voluntarily terminated his counsel, and that determination is supported by the record.

But Bush argues that the district court deprived him of counsel by denying him a continuance to engage a new lawyer. The right to counsel guaranteed by the United States and Minnesota Constitutions includes a fair opportunity for a defendant to secure counsel of their choice. *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970). But “[a] defendant may not obtain a continuance by discharging his counsel for purposes of delay or by arbitrarily choosing to substitute counsel at the time of trial.” *Id.* A district court may properly deny a continuance request “when the defendant has not been diligent in procuring counsel or in preparing for trial.” *State v. Courtney*, 696 N.W.2d 73, 82 (Minn. 2005). Whether to grant a continuance to permit substitution of counsel lies within the discretion of the district court, whose “decision is to be based on the facts and circumstances surrounding the request.” *Fagerstrom*, 176 N.W.2d at 264. An appellant must demonstrate

prejudice by the denial of the continuance to warrant appellate relief. *Courtney*, 696 N.W.2d at 81.

We discern no abuse of discretion or prejudice here. At Bush’s first appearance in July 2018, the district court granted his request for a public defender. Two months later, Bush hired another attorney. A year later, in August 2019, Bush informed the court that he intended to hire new counsel—his third lawyer. The district court continued the case to September 25, 2019, and warned Bush that he and his lawyer needed to be ready for trial at that time. Shortly before the trial date, however, Bush sought a continuance for his new lawyer to prepare for trial. The district court continued the matter. Trial was ultimately scheduled for March 10, 2020. On March 9, Bush informed the district court that he wanted to retain new counsel and requested another continuance. The district court denied the request.

The right to counsel of a defendant’s choice must be balanced against “the public interest of maintaining an efficient and effective judicial system.” *Courtney*, 696 N.W.2d at 82. Bush’s request for a continuance to obtain what would be his fourth lawyer was made the day before his trial started. In denying Bush’s request, the district court emphasized the long history of this case. Bush acknowledged to the district court that there had been “many continuances in the case” during the two years the case had been pending. On this record, Bush has not shown that he was diligent in procuring private counsel. The district court therefore did not abuse its discretion in denying another continuance.

Nor was Bush prejudiced by the denial. A defendant is prejudiced if the denial of a continuance materially affected the outcome of the trial. *State v. Vance*, 254 N.W.2d 353,

358-59 (Minn. 1977). When a competent attorney represented a defendant who was denied his choice of counsel, reviewing courts have determined that a defendant was not prejudiced by not receiving his choice of counsel. *See id.* at 359 (concluding no prejudice where attorney thoroughly investigated facts and was prepared for trial). Bush does not challenge the district court's assessment at the time that there was "no one more familiar with the case than [defense counsel] to be able to step in and give assistance to Mr. Bush during the conduct of the trial." Because Bush had two years to prepare to go to trial, and he has failed to show that his standby counsel was not prepared to assist him during his trial, he has not established that he was prejudiced by the denial of the continuance.

Finally, Bush complains that his standby counsel had a conflict of interest. After Bush informed the district court that he wished to terminate his counsel, his counsel told the district court that an ethical issue had recently arisen, which he could not discuss without violating attorney-client privilege. But, following extensive questioning by the district court and further conversation with his lawyer, Bush confirmed that he wished to have his lawyer act as advisory counsel. The district court permitted his counsel to do so. The district court did not violate Bush's constitutional right to counsel by permitting Bush to have his lawyer act as advisory counsel.

III. The district court did not abuse its discretion by denying Bush's request for a lesser-included offense instruction.

Bush argues that the district court abused its discretion by denying his request for an instruction on the lesser-included offense of second-degree criminal sexual conduct,

which only requires a showing of sexual contact rather than sexual penetration as required for first-degree criminal sexual conduct.

We review the denial of a requested lesser-included offense instruction for an abuse of discretion. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). When a defendant requests a lesser-included-offense instruction, the district court must give the instruction if the lesser offense is included in the charged offense and if the evidence provides a rational basis to both acquit the defendant of the charged offense and convict the defendant of the lesser-included offense. *Id.* at 598; *see also* Minn. Stat. § 609.04, subd. 1. When deciding whether to instruct the jury on a lesser-included offense, the district court may not weigh the evidence or make credibility determinations; instead, it must view the evidence in the light most favorable to the party requesting the instruction. *Dahlin*, 695 N.W.2d at 598.

The district court denied Bush's request for a second-degree instruction because "the testimony of Mr. Bush . . . did not really leave any room for admitting a criminal sexual conduct type case. He basically has denied that the conduct ever existed." Second-degree criminal sexual conduct requires sexual contact. Minn. Stat. § 609.343, subd. 1 (2020). Bush consistently denied that any such contact occurred. There was therefore no rational basis to acquit Bush of first-degree sexual assault and convict him of second-degree sexual assault. Either Bush was guilty of first-degree sexual conduct based on the child's testimony or he was not guilty of any criminal sexual conduct based on his own testimony. *See State v. Bates*, 507 N.W.2d 847, 853 (Minn. App. 1993) (holding there was no basis for submitting lesser-included offense instruction where defendant denied any

sexual contact), *review denied* (Minn. Dec. 27, 1993). The district court did not abuse its discretion by denying Bush's request.

IV. The district court clearly erred by entering two convictions and imposing two sentences for first-degree sexual assault.

Bush and the state agree that the district court erred by entering convictions and imposing sentences for both counts of criminal sexual conduct. We, too, agree.

Under Minn. Stat. § 609.04, subd. 1, a person “may be convicted of either the crime charged or an included offense, but not both.” The supreme court has interpreted section 609.04 to bar multiple convictions under different sections of the same criminal statute for acts committed during a single behavioral incident. *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). The state has the burden of proving that acts arose out of separate behavioral incidents in order to sustain multiple convictions. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

Count one alleged multiple acts of sexual penetration of a child under 16 years of age over a defined period of time, where there is a significant relationship with the child, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2014). Count two alleged sexual penetration of a child under 13 years of age, in violation of Minn. Stat. § 609.342, subd. 1(a) (2014). The state does not contend that the act underlying count two arose out of a separate behavioral incident than the multiple acts underlying count one. Nor would the record support such a determination. Accordingly, Bush should not have been convicted of both counts of first-degree criminal sexual conduct. We therefore reverse in part and remand for the district court to vacate one of Bush's convictions (and the

corresponding sentence) and to correct the warrant of commitment, leaving the jury's finding of guilt on both offenses intact.

Affirmed in part, reversed in part, and remanded.