STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0160

State of Minnesota,
Respondent,

vs.

Marcelo Mendez Zepeta,
Appellant.

Filed December 19, 2022
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge[*]

Scott County District Court
File No. 70-CR-20-10799

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and Halbrooks, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant challenges his two convictions of first-degree criminal sexual conduct, arguing that the district court abused its discretion by (1) admitting comments made by the victim while completing an activity with a child-protection worker as a prior consistent statement and (2) precluding appellant from questioning the victim's therapist about child memory on cross-examination and excluding evidence that the victim tested positive for a sexually transmitted infection. Appellant also argues that the district court erred by entering a conviction for the second count of first-degree criminal sexual conduct on appellant's warrant of commitment because it is an included the offense of his conviction on the first count. Because we conclude that the district court did not abuse its discretion in making the challenged evidentiary decisions or precluding the therapist from testifying about child memory, we affirm in part. However, we reverse in part and remand for correction of the warrant of commitment.

FACTS

In August 2020, respondent State of Minnesota charged appellant Marcelo Zepeta with two counts of first-degree criminal sexual conduct based on allegations that he sexually abused his minor stepdaughter, J.H., in violation of Minn. Stat. § 609.342, subd. 1(a) (2014).

Before trial, Zepeta filed notice of intent to raise an alternative-perpetrator defense and to introduce evidence that J.H. tested positive for a sexually transmitted infection in support of that defense. Specifically, Zepeta sought to introduce contradictory statements

by J.H. that a man named I.R., not Zepeta, had sexually abused her. Zepeta also sought to introduce evidence that J.H. tested positive for a sexually transmitted infection as support for the theory that I.R., not Zepeta, gave J.H. the infection. The state opposed the motion.

The state filed notice of intent to introduce a number of J.H.'s out-of-court statements, including comments she made while completing an activity with a child-protection worker called the "House of Good Things/House of Worries." During the activity, the child-protection worker asked J.H. about things that made her feel good at home and things that made her feel worried or scared at home. The child-protection worker transcribed J.H.'s responses onto worksheets with houses depicted on them—a "House of Worries" and a "House of Good Things." On the "House of Worries" worksheet, the child-protection worker recorded J.H.'s comments that the "problem thing happened there," "Marcelo said he's leaving," "[i]f Marcelo was still there, [J.H.] would feel worried because the problem thing could happen again," and "[n]o one else in the house makes [J.H] worry about the problem thing." On the "House of Good Things" worksheet, the child-protection worker also recorded J.H.'s comment that "Marcelo said he's leaving."

After a motion hearing, the district court determined that J.H.'s prior statement implicating I.R. was relevant and admissible as alternative-perpetrator evidence. But the district court determined that testimony about J.H.'s sexually transmitted infection was *not* admissible absent further proof because the timeline of the alleged abuse and testing for the sexually transmitted infection was unclear, and Zepeta had not proffered medical testimony to explain the relevance of J.H.'s diagnosis in that context. The district court further determined that Zepeta's proffered evidence would likely be confusing and

misleading to the jury and that any probative value was not substantially outweighed by its inflammatory and prejudicial nature. The district court reserved the motion to admit J.H.'s prior out-of-court statements until after J.H. testified at trial.

The case proceeded to a jury trial. The state called several witnesses including J.H., her second-grade teacher, the child-protection worker who conducted the "House of Good Things/House of Worries" activity, a nurse who interviewed J.H. at a children's clinic, J.H.'s therapist, J.H.'s younger brother, J.H.'s adoptive mother, and I.R. After the state presented its case, Zepeta testified on his own behalf.

J.H. testified that when she was in kindergarten and first grade, she lived in Shakopee with her mother, Zepeta, and two younger siblings. Two of Zepeta's coworkers also lived with them for a while. J.H. shared a bedroom with her younger brother, and Zepeta would come into their room at night and "touch [J.H.] in places [she] didn't want him to." J.H. testified that Zepeta's "private area" would touch hers, that his private area would "go into" her private area, that she felt scared, and that it hurt. She testified that the abuse happened "a lot." She also testified that Zepeta told her not to tell her mother and that "he would make it hurt more if [J.H.] did tell." J.H. told her mother anyway, hoping that she would stop the abuse. J.H.'s mother put a lock on the inside of J.H.'s bedroom door to keep Zepeta out, but J.H. testified that the abuse did not stop until she was later removed from the home.

On March 12, 2018, J.H.'s second-grade teacher heard her tell a classmate at school about "scary things that happen at night." J.H.'s teacher testified that when she asked J.H.

about it, J.H. said "[s]ometimes my dad drinks too much and does sexy things to me." Based on that comment, J.H.'s teacher made a mandated report.

That same day, a detective interviewed J.H. at school. When the detective asked if someone was hurting her at home, J.H. said "I don't really know cuz . . . [h]e like covers his stuff." J.H. told the detective that "mom catched him . . . doing stuff that I don't really know what it's called" in J.H.'s room. J.H. confirmed that her father was "doing something with his private parts." She first stated, "I don't really know who it is," but she then said, "I think it's my dad" and further clarified that she meant her stepfather.

Two days later, J.H. went to a children's clinic for a physical exam and an interview. At the clinic, J.H. told the nurse that the "problem thing" was caused by one of her stepfather's friends, I.R. When the nurse asked J.H. about how she had previously identified her stepfather, J.H. said, "Well I just figured it out. . . . I thought it was my stepdad, but it really wasn't." When asked at trial about her prior identification of I.R. as the perpetrator, J.H. testified that "I think he's one of the persons that used to live with us" and explained that "when we were on the way [to the clinic] I remember someone told me to say it was [I.R.], and I think it was [my mother]." At trial, J.H. affirmed that the "problem thing" happened with Zepeta, not I.R.

On March 23, 2018, the detective returned to the school to interview J.H. again. The detective testified that she asked J.H. who told her to tell the nurse at the children's clinic that I.R. had abused her, because it seemed to the detective like an adult had interfered. Throughout that interview, J.H. told the detective that I.R. was the perpetrator.

On April 17, 2018, J.H. completed the "House of Good Things/House of Worries" activity with the child-protection worker. J.H. testified at trial that she remembered doing the activity, but she thought she had done it with her therapist. After J.H. testified, the district court found that the comments J.H. made during the activity, as recorded by the child-protection worker, were "substantially consistent with [J.H.'s] entire testimony" and that the process of conducting the activity "was not overly leading and allowed [J.H.] to provide her own ideas and statements as to what worried her in her house and what was a good thing in her house." The district court also found it "very reasonable that [J.H.] may mistake who she told particular things to given her age at the time this happened, her age currently, the amount of chaos in her life at that time and the number of people that she had talked to." The district court therefore found that the comments J.H. made during the activity were reliable and admissible as a prior consistent statement.

J.H.'s therapist, who started seeing J.H. in 2019, also testified. The therapist stated that although J.H. was "highly guarded" at first, she eventually told the therapist about being sexually abused by Zepeta and specifically processed the sexual abuse during four different therapy sessions.

On cross-examination, the defense began questioning the therapist about the topic of child memory. The defense first asked the therapist if "any child would likely remember something in the recent past versus something in the distant past." The defense next asked "[w]hat is the memory of say a 3 year old?" The prosecution objected on the ground that the line of questioning "wasn't noticed as an area that an expert was going to testify about." The prosecutor noted that the defense's question about the memory of a three-year-old

seemed to speak to the credibility of J.H.'s younger brother, who the state intended to call as a witness and who was three years old at the time of the alleged abuse. The prosecutor further argued that, had they known that the defense was going to proffer this kind of evidence, they would have asked for a contested hearing and potentially presented their own expert on the issue.

The district court agreed with the state that testimony about child memory would constitute expert testimony requiring a proffer to address the expert witness's qualifications and the relevance of the expected testimony. The district court therefore determined that the defense did not provide proper notice of expert testimony and that expert testimony about memory can invade the purview of the jury in determining credibility. On that basis, the district court excluded any expert testimony by the therapist regarding child memory and held that the memory issue could be properly addressed through cross-examination related to the facts rather than expert issues.

Towards the end of the trial, the jury heard brief testimony from I.R. and from Zepeta himself. I.R. testified that he lived with J.H. and her family for a while and that he never sexually abused J.H. Zepeta testified that he never sexually abused J.H. or even spent time alone with her.

The jury found Zepeta guilty of both counts of first-degree criminal sexual conduct. The warrant of commitment reflects that the district court entered convictions for both counts. The district court sentenced Zepeta to 172 months in prison and ten years of conditional release. This appeal follows.

DECISION

I. The district court did not abuse its discretion by admitting comments that J.H. made during the "House of Good Things/House of Worries" activity as a prior consistent statement.

Zepeta argues that he is entitled to a new trial because the district court abused its discretion by admitting comments that J.H. made to the child-protection worker while completing the "House of Good Things/House of Worries" activity. He argues that these comments were not sufficiently consistent with J.H.'s trial testimony to be admitted as a prior consistent statement under Minn. R. Evid. 801(d). "We review a district court's evidentiary rulings for an abuse of discretion." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

Under Minn. R. Evid. 801(d)(1)(B), "a witness's prior statement that is consistent with [her] trial testimony is admissible as nonhearsay evidence if the statement is helpful to the trier of fact in evaluating the witness's credibility, and if the witness testifies at trial and is subject to cross-examination about the statement." *State v. Bakken*, 604 N.W.2d 106, 108-09 (Minn. App. 2000), *rev. denied* (Feb. 23, 2000). Before admitting a prior consistent statement into evidence, a district court must (1) make a threshold determination that the witness's credibility has been challenged, (2) determine whether the prior statement would bolster the witness's credibility, and (3) determine whether the witness's prior statement and trial testimony are consistent with each other. *Id.* at 109. The trial testimony "need not be verbatim" or "exact in every detail," as long as it is "reasonably consistent" with the prior statement. *Id.* (quotation omitted).

Here, the parties do not dispute that Zepeta challenged J.H.'s credibility on cross-examination. And the comments that J.H. made during the "House of Good Things/House of Worries" activity tend to bolster her credibility as a witness because they confirm her trial testimony that Zepeta was the perpetrator of the abuse. Before admitting the comments that J.H. made during the activity into evidence, the district court compared them to J.H.'s trial testimony and found that they were "substantially consistent."

Zepeta argues that J.H.'s trial testimony was *not* sufficiently consistent with her prior comments from the activity for several reasons: (1) the language J.H. used to describe the abuse at trial was "considerably different" from the language she used in the activity; (2) the language she used in the activity was so imprecise that it "could encompass a wide variety of sexual behavior, which affects the elements of the charged offenses"; (3) the activity allowed the child-protection worker to "launder[] J.H.'s responses through an adult's interpretation of those statements," making the information less reliable and less consistent with J.H.'s vocabulary and account; and (4) J.H. recalled doing the activity with her therapist but actually completed it with the child-protection worker, and this misidentification "affects the reliability of the activity's statements."

We are not persuaded. A witness's prior statement may be admitted as a prior consistent statement as long as it is "reasonably consistent" with the witness's trial testimony—it "need not be verbatim." *Id*. And here, the fact that J.H. used broader language ("the problem thing") to describe the sexual abuse while completing the activity with the child-protection worker does not make that statement inconsistent with her more specific description of the abuse at trial. The substantive takeaway from the comments that

J.H. made while completing the activity—and the reason their admission tended to bolster J.H.'s credibility at trial—was J.H.'s identification of Zepeta as the person who abused her. J.H.'s identification of Zepeta during the activity was consistent with her identification at trial, and the prosecutor did not rely on the comments that J.H. made during the activity to prove any specific element of the charged offenses at trial. The jury was free to determine whether J.H.'s general description in the activity of "the problem thing" credibly implied sexual abuse.

Zepeta's argument that the activity allowed the child-protection worker to "launder" J.H.'s comments through an adult's interpretation is similarly unavailing. The defense had the opportunity to cross-examine the child-protection worker when she testified at trial about completing the activity with J.H., and the jury had the opportunity to weigh the child-protection worker's credibility. We conclude that the district court did not abuse its discretion by determining that the child-protection worker "was not overly leading and allowed [J.H.] to provide her own ideas and statements as to what worried her in her house and what was a good thing in her house." Further, the district court did not abuse its discretion by determining that it was reasonable for J.H. to misidentify the person who conducted the activity with her and that the comments that J.H. made during the activity were still reliable and admissible despite the misidentification.

For these reasons, we conclude that the district court did not abuse its discretion by admitting the comments that J.H. made during the "House of Good Things/House of Worries" activity as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B).

II. The district court did not abuse its discretion by (1) preventing the defense from cross-examining J.H.'s therapist about child memory and (2) excluding evidence related to J.H.'s sexually transmitted infection.

Zepeta asserts that the district court abused its discretion by (1) preventing the defense from cross-examining J.H.'s therapist about child memory and (2) excluding evidence of J.H.'s diagnosis of a sexually transmitted infection. Zepeta argues that, by excluding this evidence, the district court violated his right to present a complete defense, including alternative-perpetrator evidence.

We review a district court's limitation of cross-examination for an abuse of discretion. *State v. Tran*, 712 N.W.2d 540, 550-51 (Minn. 2006). And we review a district court's exclusion of alternative-perpetrator evidence for an abuse of discretion. *State v. Sailee*, 792 N.W.2d 90, 93 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). We address each issue in turn.

Limitation of Cross-Examination

Zepeta first argues that preventing the defense from cross-examining J.H.'s therapist about "issues concerning child memory and recall" violated his right to present a complete defense. A defendant has a constitutional right to present a complete defense that includes the ability to present witness testimony. *Loving v. State*, 891 N.W.2d 638, 646 (Minn. 2017). But a district court has broad discretion to limit cross-examination to avoid confusing or misleading the jury, as long as it does not unduly limit the defendant's ability to elicit relevant information or violate the confrontation clause. Minn. R. Evid. 401, 402, 403; *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995).

Under Minn. R. Evid. 702, expert testimony may be admitted when the witness's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." To present expert testimony at trial, a defendant in a felony or gross-misdemeanor case must give notice during the pretrial discovery process. Minn. R. Crim. P. 9.02, subd. 1(2)(b). If a defendant fails to give the requisite notice, the district court "is in the best position to determine whether any harm has resulted from the [discovery] violation and the extent to which this harm can be eliminated or otherwise alleviated." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). To determine whether sanctions are appropriate for a discovery disclosure violation, a district court considers (1) the reason the disclosure was not made, (2) the extent of prejudice to the opposing party, (3) the feasibility of alleviating the harm through a continuance, and (4) any other relevant factors ("the *Lindsey* factors"). *Id.*

Here, the district court precluded the defense from continuing to question J.H.'s therapist, the state's witness, about child memory and denied the defense's request for a continuance. The prosecutor had objected to the testimony on the ground that the defense sought to elicit the therapist's expert opinion but had not provided proper notice of intent to elicit expert testimony. The district court agreed and denied the defense's request for a continuance based on its findings that expert testimony on child memory might invade the purview of the jury to determine witness credibility and that the defense could make its point through cross-examination related to the facts rather than expert issues.

Zepeta argues that the district court's ruling violated his constitutional right to present a defense because "[t]he state's case depended upon the specifics of what J.H. and

[her brother] remembered about the abuse" and "[Zepeta's] defense centered around challenging the trustworthiness of the children's claims." Zepeta further argues that the district court's "penalty" for the discovery violation—prohibiting any questions on the topic of child memory—was "too harsh," because (1) the therapist would have qualified as an expert, (2) the prejudice to the state was minimal since the therapist was the state's witness, (3) any prejudice could have been alleviated by qualifying the therapist as an expert at trial, and (4) the district court's ruling was disproportionate, given Zepeta's right to present a defense.

We are not persuaded. Considering the *Lindsey* factors in light of the deferential standard of review, we conclude that the district court's decision to preclude the therapist from testifying about child memory was not an abuse of discretion. The only reason offered by the defense to explain its failure to provide proper notice of intent to elicit expert testimony was that counsel for the defense did not think expert testimony was necessary. The state was prejudiced by the failure to provide proper notice because the topic of child memory was never within the scope of anticipated questioning and the state did not have the opportunity to prepare to address the topic or procure its own expert testimony. In addition, the district court was in the best position to determine that granting a continuance long enough to permit the state to obtain its own expert witness was not prudent or feasible. *See id.* ("The imposition of sanctions for violations of discovery rules . . . is a matter particularly suited to the judgment and discretion of the [district] court."). And because the defense sought to question the therapist about her expert opinion on child memory rather than a fact question specific to the charged offenses, the potential impact on Zepeta's

ability to present a complete defense was minimal. In addition, the district court reasonably determined that such testimony might invade the purview of the jury to determine witness credibility and that the defense could make its point through cross-examination related to the facts. *See State v. Scruggs*, 822 N.W.2d 631, 645 (Minn. 2012) (noting that credibility determinations are the exclusive province of the jury).

We further note that even if the district court had abused its discretion by precluding the therapist's testimony, any error was harmless beyond a reasonable doubt. The defense explained to the district court that its proposed testimony related to child memory was "basically not much more than what [was] already covered," and "the only other thing [to add] would be [that] older children remember[] better than younger children and . . . younger children tend to remember things in bits and pieces . . . not in a direct timeline or order." The defense also acknowledged that this testimony was really "about credibility," an admission which supports the district court's determination that the defense could make its points without expert testimony and the conclusion that any additional expert testimony on child memory would not have changed the verdict. The defense was still able to establish its theory of the case—that J.H. was confused after being interviewed multiple times and pressured by adults to name Zepeta as her abuser.

In sum, we conclude that the district court did not abuse its discretion by preventing the defense from further cross-examining J.H.'s therapist about the topic of child memory. We further conclude that any error in limiting such testimony would not warrant reversal because it was harmless beyond a reasonable doubt.

Exclusion of Evidence Related to J.H.'s Sexually Transmitted Infection

Zepeta asserts that the district court abused its discretion by excluding evidence that J.H. tested positive for a sexually transmitted infection because that evidence was necessary to support his alternative-perpetrator defense. A defendant has a constitutional right to a fair defense against criminal charges. *State v. Jones*, 678 N.W.2d 1, 15-16 (Minn. 2004). And a defendant may present evidence that an alternative perpetrator committed a crime if the identity of the perpetrator is at issue and the evidence "has an inherent tendency to connect the alternative party with the commission of the crime." *State v. Vance*, 714 N.W.2d 428, 436 (Minn. 2006).

Under Minn. R. Evid. 412 and Minn. Stat. § 609.347 (2022) (the rape-shield law), evidence of a victim's prior sexual conduct may be admitted "only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature" and only, in relevant part, "[w]hen the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident . . . to show the source of the semen, pregnancy or disease." Minn. R. Evid. 412(1)(B); Minn. Stat. § 609.347, subd. 3(b).

Here, the district court determined that testimony related to J.H.'s diagnosis of a sexually transmitted infection was not admissible absent a further offer of proof from the defense. The defense intended to introduce testimony revealing that J.H. had tested positive for a sexually transmitted infection and that Zepeta had tested negative, arguing that this evidence supported an alternative-perpetrator defense because it suggested that someone else committed the sexual abuse that gave J.H. the infection. But the district court found that the timeline of the alleged abuse and testing of both J.H. and Zepeta was unclear

and that the defense had not provided additional evidence or proffered medical testimony to explain the relevance of J.H.'s diagnosis. Therefore, the district court determined that the proffered evidence would be confusing and misleading to the jury and any probative value was not substantially outweighed by its prejudicial nature.

Zepeta argues that this evidence should have been admitted in order to support his alternative-perpetrator defense because the fact that J.H. tested positive and Zepeta did not "had an inherent tendency to connect [I.R.], or some unknown abuser, to the crime." Zepeta also argues that the evidence was *not* prohibited under Minn. R. Evid. 412 and Minn. Stat. § 609.347 because its probative value was not outweighed by its potential for unfair prejudice given the importance of Zepeta's constitutional right to present exculpatory evidence.

As an initial matter, evidence of J.H.'s positive test for a sexually transmitted infection was inadmissible under Minn. R. Evid. 412 and Minn. Stat. § 609.347 because the state did not intend to introduce that evidence at trial. *See* Minn. R. Evid. 412(1)(B); Minn. Stat. § 609.347, subd. 3(b). But this determination would not preclude admission of the evidence if it was essential to Zepeta's defense. *See State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992) ("In certain cases . . . the right to present evidence will require admission of evidence otherwise excluded by the rape shield law."). To support his argument that the evidence related to J.H.'s sexually transmitted infection was essential to his defense, Zepeta emphasizes a certain timeline of events. First, he asserts that the alleged abuse occurred between May 1, 2015, and March 9, 2018. Second, he emphasizes that J.H. tested positive for the sexually transmitted infection on March 14, 2018, while Zepeta tested negative on

March 20, 2018. Zepeta argues that this evidence supports his alternative-perpetrator defense by tending to connect I.R. or another abuser to the crime and that the district court therefore abused its discretion by excluding it.

We disagree. Zepeta cites the time period of the alleged abuse included in the original complaint. But the evidence presented at trial established that J.H. reported being abused in kindergarten and first grade, not in second grade. J.H. was in second grade when she reported the abuse in March of 2018, and Zepeta could have been treated for the sexually transmitted infection during the time that had elapsed since the last alleged incident of abuse. Put another way, the fact that Zepeta tested negative for the sexually transmitted infection soon after J.H. tested positive is not, as the state points out, exculpatory. Further, the evidence was insufficient to implicate I.R. as the alternative perpetrator because no evidence suggests that I.R. ever tested positive for the sexually transmitted infection.

Therefore, we conclude that the district court did not abuse its discretion by determining, given the lack of clarity around the testing timeline and lack of expert testimony to explain the significance of the evidence, that the evidence was likely to confuse the jury and that its probative value was substantially outweighed by its inflammatory or prejudicial nature. Although Zepeta tested negative for the sexually transmitted infection in March of 2018, the record evidence shows that J.H.'s mother tested positive and was treated for the same infection in 2015. While the record is unclear about whether Zepeta also tested positive at that time, he was treated for the infection because of J.H.'s mother's diagnosis. The record evidence also shows that J.H. was treated for

symptoms of a urinary tract infection during the time that Zepeta was being treated for the sexually transmitted infection. All of this evidence seems potentially relevant, but its significance is unclear without further explanation of its medical implications. We therefore conclude that the district court was appropriately concerned about confusing the jury and did not abuse its discretion by excluding evidence of J.H.'s sexually transmitted infection at trial.

III. Zepeta's second conviction must be vacated because it is an included offense of his first conviction.

Finally, Zepeta argues that the district court erred by entering a conviction on the second count of first-degree criminal sexual conduct because it is an included offense of his conviction on the first count. Whether an offense is a lesser-included offense is a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Under Minnesota law, a defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2022). When a defendant is convicted on more than one charge for the same act, the district court must "adjudicate formally and impose sentence on one count only," leaving the remaining conviction(s) unadjudicated. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We may "look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted).

Here, the official judgment of conviction in the district court file—the warrant of commitment—shows that the district court entered a conviction and sentence for count one

(sexual penetration with a person under 13 when the defendant is more than 36 months older than the child) and a conviction for count two (sexual contact with a person under 13 when the defendant is more than 36 months older than the child). The record also reflects that both offenses covered the exact same time frame.

Zepeta argues that we must remand the matter to the district court to vacate the conviction on count two (sexual contact) because it is an included offense of count one (sexual penetration), and the conviction entered on count two therefore amounts to an improper formal adjudication. The state argues that the warrant of commitment is correct because it "accurately reflects" that the jury convicted Zepeta of both counts but only formally adjudicated him on count one. The state does not appear to dispute Zepeta's contention that count two is an included offense of count one.

We agree with Zepeta that his conviction on count two must be vacated based on Minn. Stat. § 609.04, subd. 1. An included offense is "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4). To determine whether one offense is "necessarily proved" by the proof of another, we compare the statutory definitions of the offenses. *State v. Carr*, 692 N.W.2d 98, 102 (Minn. App. 2005).

Comparing the statutory definitions at issue here, sexual contact is necessarily proved when sexual penetration is proved. *See* Minn. Stat. § 609.341, subds. 11-12 (2014) (defining "sexual contact" and "sexual penetration"); *see also State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991) (noting that evidence of sexual penetration raises an inference of sexual contact), *rev. denied* (Minn. Apr. 18, 1991). A person who engages in sexual penetration *or* sexual contact with a person under 13 years of age is guilty of first-degree

criminal sexual conduct. Minn. Stat. § 609.342, subd. 1a. The statutory definition of "sexual penetration" includes sexual intercourse or "any intrusion however slight into the genital or anal openings" of the complainant's body. Minn. Stat. § 609.341, subd. 12(1)-(2). The statutory definition of "sexual contact" includes "intentional touching by the actor of the complainant's intimate parts," committed with sexual or aggressive intent. *Id.*, subd. 11(a)(i). Because Zepeta could not have committed sexual penetration (count one) without committing sexual contact (count two) and because the state does not argue that his convictions are based on separate incidents, Zepeta cannot be separately convicted on count two.

We therefore reverse in part and remand to the district court to vacate the district court's formal adjudication of count two. *See LaTourelle*, 343 N.W.2d at 284 (explaining that when a defendant is convicted of more than one charge for the same act, the district court must formally adjudicate one count only but leave the jury's finding of guilt on any remaining unadjudicated convictions intact).

Affirmed in part, reversed in part, and remanded.