STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0760

State of Minnesota,
Respondent,

vs.

Trejuan Dominic Miller,
Appellant.

Filed August 28, 2023
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CR-20-26214

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Smith, Tracy M., Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Trejuan Dominic Miller appeals from judgments of conviction for first-degree criminal sexual conduct against one victim and third-degree criminal sexual conduct against another victim. He argues that (1) the evidence presented is insufficient to support his first-degree conviction because it does not prove that he caused personal injury to the victim; (2) the district court plainly erred by omitting statutory language from the jury instruction defining "physically helpless," requiring reversal of his third-degree conviction; and (3) the warrant of commitment erroneously includes a conviction for a lesser-included offense of the first-degree conviction. Additionally, in a pro se supplemental brief, Miller asserts that (4) the evidence is insufficient to support his third-degree conviction; (5) the district court plainly erred by not sua sponte excusing a juror for cause; (6) the prosecution committed plain-error misconduct in its closing argument and by violating its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and the Minnesota Rules of Criminal Procedure; and (7) he received ineffective assistance of counsel at trial.

We affirm Miller's first-degree and third-degree criminal-sexual-conduct convictions against the two separate victims because the evidence is sufficient to support both convictions, any error in the jury instructions did not substantially impact Miller's rights, the district court did not err by not sua sponte excusing a juror for cause, the prosecution did not commit misconduct, and Miller fails to establish an ineffective-assistance-of-counsel claim. But, because the district court erred when it convicted Miller

of a lesser-included offense of his first-degree offense against the same victim, we reverse in part and remand for the district court to correct the warrant of commitment by vacating the judgment of conviction for the lesser-included offense.

FACTS

Based on allegations that, on the night of August 13, 2020, into the early morning of August 14, 2020, Miller sexually assaulted two women, E.A. and G.B., respondent State of Minnesota ultimately charged Miller with (1) first-degree criminal sexual conduct with a physically helpless victim causing injury (G.B.),[1] (2) third-degree criminal sexual conduct with a physically helpless victim (G.B.),[2] (3) first-degree criminal sexual conduct with the use of force or coercion causing injury (E.A.),[3] and (4) third-degree criminal sexual conduct using force or coercion (E.A.).[4] Miller maintained his innocence and asserted the defense that the sexual conduct with E.A. and G.B. was consensual. The matter proceeded to a jury trial.

According to testimony from both E.A. and G.B., the two women were at a bar when they met two men, later identified as Miller and a friend of his. E.A. testified that she and G.B. had been barhopping from about 8:00 p.m. to 2:00 a.m. Earlier in the night, E.A.'s car had been towed, so Miller's friend offered E.A. and G.B. a ride back to E.A.'s home. E.A. testified that, once they arrived at E.A.'s home, she told Miller and his friend that she was tired and wanted to go to bed but the two men came into her home and proceeded to

[1] Minn. Stat. § 609.342, subd. 1(e)(ii) (2020).
[2] Minn. Stat. § 609.344, subd. 1(d) (2020).
[3] Minn. Stat. § 609.342, subd. 1(e)(i) (2020).
[4] Minn. Stat. § 609.344, subd. 1(c) (2020).

do cocaine. E.A. said she went upstairs to her room and went to sleep. She testified that she awoke to Miller's friend having sexual intercourse with her. She said that she froze and that, once it was over, she left her room.

E.A. testified that, when she left her room, she entered the hall, where she saw Miller "having sex with [G.B.] from behind." G.B.'s hands and knees were on the floor. E.A. said that G.B. did not respond to her when E.A. asked her if she was okay. E.A. said that G.B. was not making any noise, not saying anything, and not participating in the sexual act. She stated that G.B.'s eyes were partially open, "kind of like the lights are on, nobody's home," and that she appeared to be "not conscious." E.A. said that she went downstairs to the bathroom and that, when she went back upstairs, she saw G.B. passed out on the floor of the hall, naked from the waist down. E.A. then went back to her room.

G.B. testified that she did not remember anything between meeting Miller and his friend at the bar and waking up the next morning with her pants off. Later tests showed that the alcohol concentration in her urine was 0.132 and the alcohol concentration in her blood was 0.09 at 12:55 p.m.—at least six hours after the incident.

Sometime after E.A. returned to her bedroom, Miller entered her room. E.A. stated that Miller told her to "suck [his] d--k" and proceeded to force his penis into her mouth. E.A. testified that Miller then pushed her down onto her bed, stood over her, and penetrated her vagina with his penis. E.A. testified that Miller was more forceful with her than his friend had been during his sexual assault of her. She said she did not feel like she could fight back or get away from Miller because he was bigger than she and he was on top of

her. She testified that she believed Miller was wearing a condom during the vaginal sexual assault. A condom was found in E.A.'s garbage can, but the condom was never tested.

E.A. testified that she woke up confused and disoriented, without any pants on. She realized that her phone and laptop and G.B.'s phone had been stolen and that her house had been "rifled through." Miller and his friend were no longer in the home. E.A. walked to the corner store near her house and called 911 to report a theft. E.A. testified that she did not mention the sexual assaults in the 911 call because she did not want to disclose that information in a public place. Police officers responded to the scene, and, after speaking with the police, both E.A. and G.B. underwent sexual-assault examinations. During the examination of E.A., the forensic nurse examiner documented 15 findings of bodily injuries on E.A.'s body. E.A. told the nurse that three were preexisting, two could be attributed to E.A. having her period, and the remaining ten were not on her body before the sexual assaults and were from causes unknown to E.A. Miller's DNA was found in G.B.'s vagina and E.A.'s mouth, and Miller's friend's DNA was found in E.A.'s vagina. Miller's DNA was not found in E.A.'s vagina. But a forensic scientist testified that "[i]t's very likely that no transfer of male DNA would be present if a condom was used in an alleged assault."

Miller also testified. He stated that he met E.A. and G.B. at a bar, he and his friend gave them a ride home, and E.A. invited them into her home. He testified that he had sexual intercourse with G.B. and oral sex with E.A. but that he did not have sexual intercourse with E.A. and did not wear a condom with either G.B. or E.A. He testified that the found condom belonged to his friend. He said that G.B. and E.A. consented to all sexual contact but that he did not remember much of the night. He stated that robbing G.B. and E.A. was

his friend's idea and that he just went along with it. He said that he saw E.A. and G.B. about ten days after the incident at the same bar in which they had met and apologized to them for stealing their belongings. He testified that G.B. gave him her cellphone number and that they exchanged text messages, in which he apologized and asked G.B. out to dinner. He stated that G.B. replied that she had a good time that night and agreed to go to dinner with him. But E.A. and G.B. both testified that they did not see Miller after the incident, and E.A. testified that she was at her parents' home—which was out of state—at the time that Miller stated they had seen each other again.

The jury acquitted Miller of first-degree criminal sexual conduct against G.B. but found him guilty of the three other charges. Miller was sentenced to imprisonment of 180 months for third-degree criminal sexual conduct with a physically helpless victim (G.B.) and 360 months for first-degree criminal sexual conduct with the use of force or coercion causing personal injury (E.A.), to be served concurrently. The district court also entered a conviction, but did not impose a sentence, for third-degree criminal sexual conduct against E.A.

Miller appeals.

DECISION

I. The evidence is sufficient to support Miller's conviction for first-degree criminal sexual conduct against E.A.

Miller asserts that the state did not prove beyond a reasonable doubt that he caused E.A. personal injury, as required to support his conviction for first-degree criminal sexual conduct with the use of force or coercion causing personal injury.

> When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted. The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict."

State v. Griffin, 887 N.W.2d 257, 263 (Minn. 2016) (quotation and citation omitted). But, when an element of an offense depends solely on circumstantial evidence—"evidence from which the factfinder can infer whether the facts in dispute existed or did not exist"—appellate courts apply a heightened, two-step standard of review. *State v. Harris*, 895 N.W.2d 592, 599-600 (Minn. 2017); *see also State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013).

Under this two-part analysis, we first identify the circumstances proved. *Silvernail*, 831 N.W.2d at 598. In so doing, we "defer to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with circumstances proved by the [s]tate." *Id.* at 598-99 (quotation omitted). Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted). We do not defer to the jury's choice between reasonable inferences. *See Harris*, 895 N.W.2d at 601. Rather, we independently examine "the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole." *Id.* "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of

the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

To obtain a conviction for first-degree criminal sexual conduct with the use of force or coercion causing personal injury, the state must prove three elements: (1) sexual penetration, (2) causing personal injury, and (3) the actor used force or coercion to accomplish the act. Minn. Stat. § 609.342, subd. 1(e)(i). Miller does not challenge the sufficiency of the evidence to establish the first element—sexual penetration—or the third element—the use of force or coercion. As for the second element, Miller does not dispute the sufficiency of the evidence to establish that E.A. had bodily harm but he argues that the evidence is insufficient to prove that he *caused* the bodily harm.

The evidence establishes the following circumstances proved. First, E.A. sustained personal injuries, a majority of which were not present before Miller assaulted her. Specifically, the nurse that conducted E.A.'s sexual-assault examination identified 15 physical findings of bodily harm on E.A.'s body:

- a bruise on her left upper arm;
- an abrasion on her right upper arm;
- an abrasion on her right lower arm;
- pain in her lower back;
- scratch on her left upper arm;
- tenderness of her lower abdomen;
- bruise on her left knee;
- two abrasions on her left thigh;
- an abrasion on the left knee;
- an abrasion on the left lower leg;
- an abrasion on the right thigh;
- an abrasion on the right knee;
- an abrasion on the right lower leg; and
- a cut with a scab on the right lower leg.

The nurse testified that E.A. told her that three of these injuries—the abrasions on her right arm and bruise on her left arm—were preexisting, and that one of the injuries—abdominal tenderness—could be due to E.A. menstruating at the time of the sexual assault. The nurse also testified that back pain would not be uncommon with menstruation as well. This leaves ten injuries that were not present on E.A.'s body before the incident and would not be associated with menstruation. The nurse testified that E.A. was not able to account for those injuries. The nurse agreed that, while it is "common for patients to have small scratches or bruises and not know where they came from," "it would be unusual to have the number of findings that [she] saw [on E.A.] from sort of self-inflicted accidental causes."

Second, the evidence establishes that Miller used force upon E.A.'s body during the assault. Specifically, E.A. testified that Miller was "forceful . . . nonnegotiable, persistent" in demanding that she "suck [his] d--k" and in forcing his penis in her mouth and vagina. The nurse testified that E.A. described Miller as being "rough and forcible." Also, Miller—who was at least six feet tall—was taller and bigger than E.A., and he was standing over her between her and the doorway of her room when he "pushed [E.A.] on the bed and was on top of [her]."

These circumstances proved are consistent with the determination that Miller caused E.A.'s bodily harm when he sexually assaulted her. Miller argues, however, that the circumstances proved are also consistent with the reasonable hypothesis that the injuries were caused by something or someone else, such as his friend who also sexually assaulted

E.A. that night. But E.A. testified that Miller's friend was not forceful when he assaulted her, and she did not identify any of the injuries existing before *Miller* assaulted her. Therefore, the hypothesis that Miller did not cause the injuries to E.A.'s body is not reasonable because none of the circumstances proved points toward another individual causing the injuries to E.A. And the nurse confirmed at trial that the number of injuries to E.A.'s body was "unusual" for normal everyday scratches and bruises. The only reasonable inference to be drawn from the circumstances proved is that the ten injuries to E.A.'s body that were discovered after the incident were caused by Miller's use of force when he pushed his penis into E.A.'s mouth, pushed her down on her bed, got on top of her with his taller stature and bigger build, and held her down while he penetrated her vagina.

Thus, the evidence presented by the state at trial is sufficient to sustain Miller's conviction for first-degree criminal sexual conduct against E.A.

II. Miller's plain-error challenge to the jury instructions fails.

Miller contends that the district court erred when it omitted the phrase "because of a physical condition" from the jury instruction defining "physically helpless," which appears in the statutory definition of physically helpless. *See* Minn. Stat. § 609.341, subd. 9 (2020). He contends that the error entitles him to a new trial for his third-degree criminal-sexual-conduct conviction against G.B.

Because Miller did not object to the jury instructions at trial, we review this issue for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). Generally, to meet the plain-error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights. *State v. Myhre*,

875 N.W.2d 799, 804 (Minn. 2016). An error is plain if it is clear or obvious and contravenes caselaw or a rule. *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010). An error affects a defendant's substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict. *Milton*, 821 N.W.2d at 809. Even if the first three requirements are met, appellate courts will "correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

"A district court errs when its instructions confuse, mislead, or materially misstate the law." *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009). A district court's jury instructions "must be read as a whole to determine whether they accurately describe the law." *Id.*

To find Miller guilty of third-degree criminal sexual conduct with a physically helpless victim, the jury had to find that the state proved two elements beyond a reasonable doubt: (1) sexual penetration and (2) the actor knew or had reason to know that the complainant was physically helpless. Minn. Stat. § 609.344, subd. 1(d). For the second element, "'[p]hysically helpless' means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9. At Miller's trial, the district court defined "physically helpless" by stating, "A person is physically helpless if she is,

one, asleep or not conscious, B, unable to withhold consent or, C, unable to communicate nonconsent."[5]

Miller argues that the district court's definition of physically helpless was plainly erroneous because it would encompass the inability to withhold or withdraw consent due to a *mental* condition, not just a *physical* condition. The state counters that there was no error because no reasonable juror would think that the term includes a mental condition since the word "physical" appears in the phrase itself and the preceding definition of physically helpless—being asleep or not conscious—references physical, not mental, conditions.

We need not resolve whether the district court erred or, if it did err, whether the error was plain, because Miller has not established that any error substantially prejudiced his rights. The omission of the phrase "because of a physical condition" would not have had a significant impact on the jury's verdict because, in the context of this case, no reasonable juror would think that the phrase applied to a mental condition. Neither attorney argued that G.B. had a mental condition or that she was unable to withhold consent due to a mental condition. Nor was any evidence submitted about a mental condition. The only condition discussed regarding G.B. was her extreme intoxication, which rendered her motionless, with eyes half-open, and unable to respond to E.A. when E.A. encountered G.B. on the hall floor with Miller having sex with her from behind and which left G.B.

[5] Although the district court omitted more than the "because of a physical condition" from the statutory definition of physically helpless, because Miller does not challenge those omissions, we do not address them.

with no memory of the incident. As such, a jury would determine that G.B. was "unable to withhold consent" only because of her physical condition of extreme intoxication and not because of some mental condition. Because Miller has not established the third prong of the plain-error test, his challenge to the unobjected-to jury instruction fails.

III. The warrant of commitment contains an erroneous conviction for the lesser-included offense of third-degree criminal sexual conduct against E.A.

Miller argues that the district court erred because, although it stated in a written sentencing order that it would leave the guilty verdict for third-degree criminal sexual conduct against E.A. "unadjudicated as a lesser included offense of" his offense of first-degree criminal sexual conduct against E.A., the warrant of commitment reflects a conviction for both offenses. The state agrees that the conviction for the lesser-included offense is error, as do we.

A person can be convicted "of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1(1) (2020). The jury found Miller guilty of third-degree criminal sexual conduct with the use of force or coercion against E.A. in violation of Minnesota Statutes section 609.344, subdivision 1(c), *and* first-degree criminal sexual conduct with the use of force or coercion causing injury against E.A. in violation of Minnesota Statutes section 609.342, subdivision 1(e)(i). The third-degree offense is a lesser-included offense of the first-degree charge because the two elements needed in the third-degree charge—(1) sexual penetration and (2) the actor used force or coercion—would be proved if the first-degree charge's elements were proved—(1) sexual penetration, (2) causing personal injury, and (3) the actor used force or coercion. Minn. Stat.

§§ 609.344, subd. 1(c), .342, subd. 1(e)(i); *see also State v. Walker*, 913 N.W.2d 463, 466 (Minn. App. 2018) (explaining that a lesser-included offense is "a crime necessarily proved if the crime charged were proved" (quotation omitted)). The lesser-included offense therefore should have been left unadjudicated. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

As a result, we reverse and remand to the district court with instructions to vacate Miller's conviction for third-degree assault against E.A. while leaving the jury's guilty verdict for that offense intact. *See Walker*, 913 N.W.2d at 467-68.[6]

IV. The evidence is sufficient to support Miller's conviction for third-degree criminal sexual conduct against G.B.

Miller, in his pro se supplemental brief, argues that the evidence does not support his conviction for third-degree criminal sexual conduct with a physically helpless victim against G.B.

This offense required the state to prove two elements: (1) sexual penetration and (2) the actor knew or had reason to know that the complainant was mentally impaired, mentally incapacitated, or physically helpless. Minn. Stat. § 609.344, subd. 1(d). In Miller's case, the jury was instructed only on G.B. being physically helpless. For the first element, the definition of sexual penetration includes "sexual intercourse" or "any intrusion however slight into the genital . . . openings." Minn. Stat. § 609.341, subd. 12(1)-(2)

[6] We note that, based on the district court's statement in its written sentencing order, the notation of a conviction on the warrant of commitment appears to have been nothing more than a clerical error. Clerical errors may be corrected in the district court at any time. *See* Minn. R. Crim. P. 27.03, subd. 10.

(2020). For the second element, a person is "physically helpless" if the person is "(a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9.

Looking at the record in the light most favorable to the verdict and disregarding evidence and testimony that does not support the verdict, we conclude that the evidence is sufficient to prove Miller guilty of this offense. *See Griffin*, 887 N.W.2d at 263. The first element—sexual penetration in the form of vaginal sexual intercourse—is not challenged. The second element—G.B. was physically helpless—is supported by the evidence. G.B. testified that she did not have any recollection of the sexual contact with Miller. E.A. testified that, when she witnessed Miller having sex with G.B., G.B. was not responsive when E.A. asked her if she was okay and G.B. was not moving, not making noise, not saying anything, and not participating in the sexual act with Miller. E.A. described G.B. as having her eyes partially open, "kind of like the lights are on, nobody's home." E.A. found G.B. passed out on the floor without pants on after the sexual intercourse with Miller. Additionally, G.B.'s alcohol concentration at least six hours after the alleged assault was 0.132 in her urine and 0.09 in her blood, which is still over the legal limit for driving. *See* Minn. Stat. § 169A.20, subd. 1(5) (2020). G.B.'s alcohol concentration, nonresponsiveness, and lack of recollection of the sexual assault would lead a reasonable jury to only one conclusion—that G.B. was either unable to withhold or withdraw consent or unable to communicate nonconsent, which satisfies the physically helpless element of the offense.

V. The district court did not err by not sua sponte excusing a juror for cause.

In his pro se supplemental brief, Miller also asserts that the district court abused its discretion by not sua sponte excusing a juror from the jury panel after the juror expressed some hesitation and reservations about her English skills. Specifically, Miller maintains that the juror was biased and violated his right to a fair trial. Although we generally review a denial of a for-cause challenge of a juror for an abuse of discretion, *see State v. Munt*, 831 N.W.2d 569, 576 (Minn. 2013), because Miller neither objected to the juror nor moved to strike the juror for cause at trial, we review this issue for plain error.

Generally, to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights. *Myhre*, 875 N.W.2d at 804 An error is plain if it contravenes caselaw or a rule. *Cao*, 788 N.W.2d at 715. Even if the first three requirements are met, we "correct the error only when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczinski*, 972 N.W.2d at 356.

The United States and Minnesota Constitutions guarantee a criminal defendant the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The bias of even a single juror violates a defendant's constitutional rights because "the impartiality of the adjudicator goes to the very integrity of the legal system." *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (quotation omitted). The party challenging a prospective juror on this ground has the burden of establishing that the prospective juror has "actual bias" toward the case or a party. *Munt*, 831 N.W.2d at 577.

A district court does not have a duty imposed by rule or caselaw to dismiss a juror for cause sua sponte. *State v. Gillespie*, 710 N.W.2d 289, 296 (Minn. App. 2006), *rev. denied* (Minn. May 16, 2006). Accordingly, by not striking the juror for cause sua sponte, the district court did not contravene caselaw or a rule. *See Cao*, 788 N.W.2d at 715. Moreover, even if the district court has a duty to dismiss jurors for cause sua sponte, we have held that the exercise of that duty would be subject to the district court's discretion. *Gillespie*, 710 N.W.2d at 297. Here, the record supports the district court's decision not to sua sponte dismiss the juror for cause because there is no evidence that the juror was biased towards Miller. No caselaw indicates that a hesitation about English skills means a juror is biased toward the defendant. Also, the district court determined that the juror's English was sufficient to proceed to trial, given that the juror was able to answer all the jury-questionnaire questions and participate in voir dire in English. This determination was reasonable. Thus, Miller has failed to demonstrate an error that is plain.

VI. The prosecution neither committed misconduct nor violated *Brady* or discovery obligations at trial.

In his pro se supplemental brief, Miller argues that the prosecution committed misconduct in two instances at trial: (1) the prosecution made improper insinuations that the condom found at the scene belonged to Miller, even though the prosecution did not have the condom tested for DNA, and (2) the prosecution violated its *Brady* and discovery obligations by suppressing exculpatory evidence in the form of a flip phone that allegedly contained text messages that had been exchanged between Miller and G.B. after the incident.

A. The prosecution's comments regarding the condom found at the scene was not misconduct.

Miller contends that the prosecution made "insinuations and innuendo" during closing argument about the condom found at the scene being his, even though the condom was not tested for DNA, which prejudiced him because it "plant[ed] in the minds of the jury" that he sexually assaulted E.A. through vaginal penetration with a condom. Miller did not object to the prosecution's statements at trial.

When a defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing error that is plain; if the defendant does so, the burden shifts to the state to prove that the plain error did not affect the defendant's substantial rights. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). "A plain error affects a defendant's substantial rights if it was prejudicial and affected the outcome of the case." *Id.* (quotation omitted). In evaluating whether the state has satisfied its burden, we consider "the pervasiveness of improper suggestions and the strength of evidence against the defendant." *Id.* (quotation omitted).

The prosecution commits misconduct when it "violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). But the prosecution has "considerable latitude" during closing arguments. *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998). The prosecution "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence

in its closing argument," but it may not speculate without a factual basis, intentionally misstate the evidence, or mislead the jury as to the inferences it may draw. *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016) (quotation omitted).

In its closing argument, the prosecution mentioned the condom three times—twice in its principal closing argument and once in its rebuttal. During its principal closing argument, it stated that E.A. testified that Miller vaginally assaulted her while wearing a condom; a forensic scientist testified that one would not expect DNA transfer if a person were wearing a condom; Miller's DNA was not present in E.A.'s vagina after the incident; and, a condom was found in the garbage at E.A.'s home. In its rebuttal, the prosecution stated that Miller's friend's DNA was found in E.A.'s vagina after the incident, "[s]o we know it wasn't his condom," and condoms are not great sources of DNA due to their movability. In each statement, the prosecution was arguing from testimony or other evidence presented at trial. Miller complains that the prosecution's statements suggested that the condom was his. But, even if that inference was suggested, the jury was permitted to make it and the prosecution permitted to argue it because it was a reasonable inference from the evidence. Therefore, the prosecution did not err by suggesting an inference as to the owner of the condom in its closing argument.

B. The prosecution did not violate its disclosure obligations because it did not suppress Miller's flip phone.

Miller asserts that, about a week after the incident, he saw E.A. and G.B. at a bar, apologized for stealing their property, exchanged phone numbers with G.B. and texted her, offering to meet to return their property and take her out to eat. He claims that they texted

back and agreed to meet him, and that the texts "will show that E.A. and G.B. never mentioned anything about them being sexually assaulted, only that they were up-set because their property was stolen, and they wanted back." Miller maintains that the flip phone should have been disclosed by the prosecution under *Brady* and rule 9.01 of the Minnesota Rules of Criminal Procedure because the evidence on the phone "is very impeachable and is exculpatory," it "is material," and its absence from the case prejudiced him by weakening his case.

Under *Brady*, a defendant's due process rights might be violated if the state withholds favorable evidence. 373 U.S. at 87. Three elements must be met to prove a *Brady* violation:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
>
> (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
>
> (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Thoresen v. State, 965 N.W.2d 295, 304 (Minn. 2021). Similarly, under rule 9.01, the state must disclose to the defense "[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt." Minn. R. Crim. P. 9.01, subd. 1(6).

Miller fails to establish a *Brady* violation or a discovery violation because he has not established that any evidence was suppressed, intentionally or otherwise. The prosecution made extensive efforts to find the alleged text messages in response to defense

counsel's request shortly before trial to track down one of Miller's phones. At trial, Miller's attorney stated she was working with the state to find the phone, but, since there were approximately 16 phones in property from Miller's seven drug cases, it had proved more difficult than anticipated. Miller first claimed the text messages appeared on a Samsung flip phone, but when the prosecution found no such Samsung phone, he asserted that it might be another brand of flip phone, which was in the state's possession in his pending first-degree drug case. The state located a flip phone, but even with the help of the information technology department, the state was unable to power the flip phone on. These efforts show the prosecution did everything it could to uncover these alleged text messages; as such, the record does not support Miller's claim that the prosecution suppressed or failed to disclose evidence favorable to his defense.

VII. Miller's ineffective-assistance-of-counsel claims fail.

In his pro se supplemental brief, Miller also asserts four claims of ineffective assistance of counsel. When an ineffective-assistance-of-counsel claim can be determined based on the district court record, it can be decided on direct appeal. *See Sanchez-Diaz v. State*, 758 N.W.2d 843, 847 (Minn. 2008). The record here is sufficient to decide the four claims that Miller advances.

Ineffective-assistance-of-counsel claims are evaluated according to the two-prong *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (applying the *Strickland* test). To meet this test, an appellant must show that (1) the attorney's representation "fell below an objective standard of reasonableness" and (2) "there was a reasonable probability that, but for [the attorney's]

errors, the result of the proceedings would have been different." *Peltier*, 946 N.W.2d at 372 (quotation omitted). When one prong of the *Strickland* test is determinative, we need not address the other prong. *Id.* Generally, we will not review attacks on counsel's trial strategy. *See State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). And we apply a strong presumption that an attorney's "performance falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted).

A. Miller's attorney's decisions to neither hire a DNA expert nor test the condom found at the scene was reasonable trial strategy.

First, Miller argues that his attorney's failure to get the condom found at E.A.'s house tested for DNA evidence or hire a DNA expert was unreasonable and prejudiced his case.

His argument fails the first *Strickland* prong. Appellate courts generally do not review matters of trial strategy, including decisions not to pursue expert testimony. *See Nicks*, 831 N.W.2d at 506 (explaining that appellate courts have rejected claims that trial counsel was ineffective for failing to hire a private investigator because the extent of any investigation is a part of trial strategy).

Moreover, Miller's attorney's conduct with regard to the condom was reasonable. Miller's attorney cross-examined the forensic scientists about the lack of testing done on the only condom found at the scene in order to create doubt as to the thoroughness of the state's investigation into Miller's case. And the defense argued in its closing argument that the condom was not tested by the state due to its lack of diligence, that the condom does

not prove anything, and that it holds no evidentiary value. This defense argument could have been undermined had Miller's attorney obtained DNA test results. Additionally, the risk of getting the condom tested was that it would contain Miller's DNA. Although Miller adamantly claims that the condom was his friend's, it is reasonable that an attorney would not want to take the risk of testing a condom that was found in a garbage can and that could potentially provide more evidence for the state to prove guilt.

B. Miller's attorney's decision not to call Miller's friend as a witness was reasonable trial strategy.

Second, Miller maintains that his attorney's failure to call his friend—who was present the night of the incident, who helped rob E.A. and G.B., and who was accused of sexually assaulting E.A.—as a witness at his trial was unreasonable and prejudicial because his friend would have testified that Miller did not sexually assault either victim.

After Miller made a record about wanting his friend to testify as his "star witness," his attorney explained to the district court that she made a strategic decision not to call his friend as a witness. Again, trial strategy is typically not subject to review for ineffective assistance of counsel. *See Nicks*, 831 N.W.2d at 506 (explaining that appellate courts have rejected claims that trial counsel was ineffective for failing to call a prospective witness as trial strategy).

Moreover, this was a reasonable decision by Miller's attorney. Given Miller's friend's involvement in the incident, as well as the friend's other criminal convictions, defense counsel could have reasonably concluded that the jury would not find the friend credible if Miller called him to testify that Miller did not sexually assault E.A. or G.B.

C. Miller's attorney's decision not to strike a juror for cause was reasonable.

Third, Miller asserts that his attorney's decision not to strike a juror after the juror expressed that she had reservations about her English skills was unreasonable, prejudiced his case, and impacted his right to a fair trial.

Miller's attorney's decision not to strike the juror was a matter of trial strategy. *See White v. State*, 711 N.W.2d 106, 110 (Minn. 2006) (stating that decisions about objections at trial are matters of trial strategy).

Moreover, the decision was reasonable. According to one of the deputies at trial, the juror expressed "some hesitation and reservations about her English skills." The juror did not state that she does not speak English. And she did not express any bias to Miller in her juror questionnaire or during voir dire. In fact, the juror was able to answer the questions without issue. It is reasonable that Miller's attorney would not strike this juror for cause because she observed that this juror spoke sufficient English to be a juror, showed no bias toward Miller, and would be able to adequately exercise her duties as a juror.

D. Miller's attorney's decision not to introduce the responding officer's body-camera footage was reasonable trial strategy.

Fourth, Miller argues that his attorney's decision not to introduce footage from a responding officer's body camera that shows the initial police interview with E.A. and G.B. was unreasonable and prejudiced his case because it would have shown that the officer "planted the seeds in the minds" of E.A. and G.B. that they might have been sexually assaulted when G.B. actually "blacked out from drinking too much and could not remember what happened."

Decisions about what evidence to introduce is a matter of trial strategy. *See Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (explaining that appellate courts generally will not review an ineffective-assistance-of-counsel claim that is based on trial strategy, which "includes the selection of evidence presented to the jury").

Moreover, Miller's attorney's decision not to introduce the officer's body-camera footage was reasonable. Showing the footage of E.A. and G.B. after the incident could have made them appear more sympathetic. The transcript of the footage shows that both E.A. and G.B. were not quick to say they were sexually assaulted, which could cut against Miller's argument that their accusations were intended to get back at him for robbing them. And the footage transcript corroborates G.B.'s testimony that she did not remember anything from the night of the incident, which could have bolstered her credibility. In addition, because the officer testified at trial to the sequence of events that Miller complains of, the jury was able to determine whether the officer's exchange with his partner before speaking to E.A. and G.B. about potential sexual assault appeared to coerce them.

In sum, we reject all Miller's challenges to his first-degree criminal-sexual-conduct conviction against E.A. and his third-degree criminal-sexual-conduct conviction against G.B. and thus affirm in part. But we reverse in part and remand to the district court to correct his warrant of commitment by vacating his conviction for third-degree criminal sexual conduct against E.A. while leaving the guilty verdict intact.

Affirmed in part, reversed in part, and remanded.