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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Christopher Jerome SALAZAR, Appellant.

No. A08-0264.
|
April 14, 2009.

West KeySummary

1 **Criminal Law** ⟵ Effect of Grant of Immunity

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence
110k42.6 Effect of Grant of Immunity

The criminal case of a defendant police officer, who faced criminal charges for providing alcohol to minors, was not tainted by compelled statements given during an internal-affairs investigation. The internal affairs investigator provided no information to the police department that charged the defendant officer. The prosecutor testified that the decision to charge the defendant officer was made solely on information from the police department and that the case file contained no information from any other investigative body. Minn. R. Prof. Conduct 1.10(b)(2).

Stearns County District Court, File No. K0-06-1705.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN, Janelle P. Kendall, Stearns County Attorney, Sarah E. Hilleren, Assistant County Attorney, St. Cloud, MN, for respondent.

James M. Ventura, Wayzata, MN, for appellant.

Considered and decided by KLAPHAKE, Presiding Judge; PETERSON, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

PETERSON, Judge.

***1** In this appeal from convictions of two counts of aiding and abetting furnishing alcohol to minors and one count of indecent exposure, appellant argues that (1) the district court erred in finding that his criminal case was not tainted by compelled statements given during an internal-affairs investigation, (2) his codefendant's acquittal precludes his aiding-and-abetting convictions, and (3) the state failed to comply with its discovery obligations. We affirm.

FACTS

Appellant Christopher Salazar, a Benton County sheriff's deputy, lived with John Dirksen, a Wright County sheriff's deputy. Appellant also rented a room in the basement of his house to H.P.

On February 12, 2006, H.P. was visited by her 16-year-old sister and her sister's 16-year-old friend. At around 2:36 a.m., appellant and Dirksen entered H.P.'s part of the basement, woke H.P. and the two girls, and told them that it was "underage consumption night and to get upstairs and ... come drinking with them." H.P. initially refused, but eventually followed the others to the kitchen, where many bottles of alcohol and glasses had been set out. Appellant began mixing alcoholic drinks, which either he or Dirksen handed to the visitors. H.P., who was pregnant, refused to drink and attempted to discourage the two underage girls from drinking. However, each girl ultimately drank a large quantity of alcohol. H .P. could not recall how much the girls consumed, but noted that her sister's glass "never got empty" because Dirksen kept refilling it.

Appellant and Dirksen both began to encourage the two girls to flash their breasts at them. H.P.'s sister refused, but her friend "finally gave in" and briefly exposed her breasts and/or buttocks. At some point, appellant and Dirksen borrowed H.P.'s cell phone and photographed their testicles, intending to send the pictures to H.P.'s fiancé as a joke. Appellant then shocked H.P. by walking over and "pull[ing] his penis out in front of [her]."

Several days later, after discussing the incident with her mother and fiancé, H.P. decided to report the incident to an officer with the St. Cloud Police Department. As a result, the St. Cloud Police Department initiated a criminal investigation of both appellant and Dirksen and notified the sheriff's offices where they worked, which prompted each office to begin an internal-affairs investigation.

Detective Sergeant Troy Heck conducted Benton County's investigation of appellant. During the investigation, Heck took a compelled *Garrity*[1] statement from appellant after giving him the appropriate warning that failure to discuss the incident could result in dismissal and that the contents of his statement would not be used in any criminal proceeding.

1 *See generally Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (holding that compelled self-incriminatory statements during an internal-affairs investigation may not be used in subsequent criminal proceedings and requiring investigator to warn subject of investigation of consequences of making or refusing to make such statements).

Appellant was charged with two counts of aiding and abetting furnishing alcohol to a minor in violation of Minn.Stat. §§ 340A.503, subd. 2(1), .702(8), 609.05 (2004); one count of indecent exposure in violation of Minn.Stat. § 617.23, subd. 1(1) (2004); and one count of aiding and abetting procuring indecent exposure in violation of Minn.Stat. §§ 617.23, subd. 1(2), 609.05 (2004). Dirksen was also charged with all of these offenses, except indecent-exposure.

***2** In light of his *Garrity* statements, appellant requested a *Kastigar*[2] hearing to ensure that none of the statements he was compelled to make during the internal-affairs investigation were being improperly used to prosecute him. At the *Kastigar* hearing, Heck testified that he performed his internal-affairs investigation without assistance from anyone else and that he did not discuss his investigation with anyone from either the St. Cloud Police Department or the Stearns County Attorney's Office or disclose its contents to them. The only person to whom Heck disclosed the contents of appellant's *Garrity* statements was a deputy in the Benton County Sheriff's Office. This was confirmed by the officer in charge of the criminal investigation conducted by the St. Cloud Police Department, who testified that his contact with the internal-affairs investigation was limited to providing information to Heck and that he received no information from Heck. A Stearns County prosecutor testified that he made the charging decision based entirely on information provided by the St. Cloud Police Department and that the case file contained no information from any other investigative body. The district court found this testimony credible and concluded that the criminal proceedings were not tainted by the contents of appellant's *Garrity* statements.

2 *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972) (explaining that state has burden of showing that proposed evidence is derived from legitimate source independent of compelled testimony).

Following appellant and Dirksen's joint trial, the jury found appellant guilty on all counts, except aiding and abetting procuring indecent exposure, and acquitted Dirksen on all counts. This appeal followed.

DECISION

I.

Appellant argues that the state's failure to call H.P. and the two 16-year-old girls at the *Kastigar* hearing prevented the state from establishing that their trial testimony was not tainted by his compelled *Garrity* statements. When a police officer is compelled under threat of dismissal to give statements during an internal-affairs investigation of misconduct, the Fourteenth Amendment prohibits the use of those statements in subsequent criminal proceedings. *Garrity v. New Jersey*, 385 U.S. 493, 499-500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Although the officer being investigated may be prosecuted for the underlying acts to which the statements relate, he is entitled to use-and-derivative immunity with respect to those statements. *State v. Gault*, 551 N.W.2d 719, 723 (Minn.App.1996) (applying *Kastigar v. United States*, 406 U.S. 441, 453, 460, 92 S.Ct. 1653, 1661, 1664-65, 32 L.Ed.2d 212 (1972)), *review denied* (Minn.

Sept. 20, 1996) *and appeal dismissed and order granting review vacated* (Minn. Feb. 27, 1997). Consequently, the district court must hold a *Kastigar* hearing to determine whether, and to what extent, criminal proceedings are tainted by the use of the defendant-officer's compelled *Garrity* statements. *See id.* (describing hearing requirements). On appeal, we review the constitutional question of taint de novo, but defer to the district court's findings on the underlying factual circumstances unless clearly erroneous. *See State v. Buchanan*, 431 N.W.2d 542, 551-52 (Minn.1988) (stating standard of review in a suppression-of-involuntary-confession context).

***3** At a *Kastigar* hearing, the state has the burden of proving by a preponderance of the evidence that it did not use the *Garrity* statements " 'in any respect' that could 'lead to the infliction of criminal penalties on [the defendant].' " *Gault*, 551 N.W.2d at 723, 725 (emphasis omitted) (quoting *Kastigar*, 406 U.S. at 453, 92 S.Ct. at 1661). Appellant contends that the state failed to meet this burden because it did not call any of the three fact witnesses. Appellant argues that calling these witnesses was necessary to establish that Heck did not taint them by revealing information gleaned from appellant's compelled statements when he questioned them during the internal-affairs investigation. Rather than calling only law-enforcement witnesses to testify about their agency's respective exposure to the contents of the *Garrity* statements, appellant argues that the state was required to call each fact witness and proceed through their testimony " 'line-by-line and item-by-item' " in order to demonstrate " 'that no use whatsoever was made of any of the [privileged statements] either by the witness or by the [investigator] in questioning the witness.' " *Id.* at 723 (first alteration in original) (quoting *United States v. North*, 910 F.2d 843, 872 (D.C.Cir.1990), *modified on other grounds*, 920 F.2d 940 (D.C.Cir.1990)).

The facts of this case distinguish it from the cases that appellant relies on in his argument. In *Gault*, for example, the city attorney's office's case file initially contained the defendant-officer's *Garrity* statements. *Id.* at 722. Once a prosecutor assigned to the case recognized the statements for what they were, the office attempted to purge itself of the taint by removing and sealing the problematic statements and reassigning the case. *Id.* Thus, the detailed inquiry that appellant contends is needed in this case was necessary in *Gault* because the city attorney's office responsible for prosecuting the defendant-officer was exposed to his *Garrity* statements and might have used the statements, even unintentionally, to develop its trial strategy. *Id.* at 724-25. Unlike *Gault*, however, the district court found that Heck did not disclose the contents of the internal-affairs investigation to either the police department conducting the criminal investigation or to the county attorney's office responsible for prosecuting appellant.

Appellant also relies on *North* to suggest that a witness-by-witness inquiry was necessary because Heck might have unintentionally used what he learned from appellant's compelled statements to formulate his questions when interviewing the three fact witnesses, thereby using that information to refresh their recollections. But in *North*, many of the fact witnesses had been directly exposed to the substance of defendant Lieutenant Colonel Oliver North's compelled testimony before Congress because the congressional hearings were broadcast live on national television and radio, replayed on the news, and extensively analyzed in the public media. *North*, 910 F.2d at 851, 863-64. In contrast, the witnesses here had no comparable exposure to appellant's statements, and Heck testified that the only person to whom he disclosed the *Garrity* information was a deputy at the Benton County Sheriff's Office. Also, although the state had the burden of proving that it did not use the contents of appellant's statements, appellant offered no evidence to rebut Heck's testimony, and the district court was entitled to find the testimony credible. *See State v. Sletten*, 664 N.W.2d 870, 876 (Minn.App.2003) (stating that weighing witness credibility is exclusive function of fact-finder).

***4** The evidence establishes that the criminal proceedings were effectively "screened off" from appellant's *Garrity* statements. *Cf.* Minn. R. Prof. Conduct 1.10(b)(2) (requiring law firms wishing to avoid an imputed conflict of interest when representing a party adverse to a lawyer's former client to subject that lawyer "to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation", 1.11 (similar rule for lawyer who is former or current public officer or employee), 1.12 (similar rule for lawyer who is former judge, arbitrator, or other third-party neutral). Consequently, we conclude that the district court did not err when it determined that appellant's criminal prosecution was not tainted by exposure to the *Garrity* statements.

II.

Appellant argues that Dirksen's acquittal on the aiding-and-abetting furnishing-alcohol-to-minors counts precludes his convictions on them. This argument is without merit.

Under the aiding-and-abetting statute, "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn.Stat. § 609.05, subd. 1. Appellant emphasizes the phrase "crime committed by another," but he ignores the subdivision of the statute that provides that "[a] person liable under this section may be charged with and convicted of the crime although the person who directly committed it has not been convicted." *Id.*, subd. 4. Thus, Dirksen's acquittal does not preclude appellant's conviction.

Also, the complaint charged appellant with "aiding and abetting *and being aided and abetted by another* " to furnish alcohol to each minor girl. (Emphasis added.) In other words, appellant was charged as both principal and accomplice. The jury's verdict reflects a finding that appellant, not Dirksen, was the principal.

III.

Appellant argues that he is entitled to a new trial because the prosecution failed to provide him with Heck's file from the internal-affairs investigation. This argument is without merit.

A prosecutor must, upon request, "allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case." Minn. R.Crim. P. 9.01, subd. 1. In addition, the prosecutor must permit defense counsel to inspect and reproduce any "relevant written or recorded statements and any written summaries ... of the substance of relevant oral statements made by [witnesses intended to be called at trial] to prosecution agents." *Id.*, subd. 1(1)(a).

The scope of a prosecutor's obligations under rule 9.01, extends only "to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office." *Id.*, subd. 1(8). Under the plain language of rule 9.01, the prosecutor's discovery obligations do not extend to the internal-investigation file in this case. The Stearns County Attorney's Office did not have possession or control of, or even access to, the contents of Heck's investigation. And Heck did not report to the Stearns County Attorney's Office with respect to an internal-affairs investigation conducted by the Benton County Sheriff's Office. Indeed, as the state astutely asserts, requiring the prosecutor to obtain the internal-investigation materials in order to give them to appellant would create a further *Garrity* issue in and of itself. Regardless of whether appellant was entitled to access these materials for *Kastigar* hearing purposes, requesting them from the prosecutor was not the appropriate channel.

***5 Affirmed.**

All Citations

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Byron Lester GOLDTOOTH, Appellant.

No. A15–0077.
|
Sept. 6, 2016.
|
Review Denied Nov. 23, 2016.

Redwood County District Court, File No. 64–CR–12–1081.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, Minnesota and Steven S. Collins, Redwood County Attorney, Redwood Falls, MN, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Sara Martin, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by JESSON, Presiding Judge; HALBROOKS, Judge; and HOOTEN, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge.

***1** In this combined direct and postconviction appeal, appellant challenges the postconviction court's denial of relief and an evidentiary hearing and argues that the district court deprived him of his right to present a defense by excluding certain evidence. We affirm.

FACTS

In December 2012, appellant Byron Lester Goldtooth was charged by complaint with two counts of first-degree criminal sexual conduct. The complaint alleged that Goldtooth sexually penetrated C.L., his girlfriend's daughter, when C.L. was less than 13 years of age. Following a jury trial, Goldtooth was found guilty of both counts, and the district court entered convictions on both counts.

Goldtooth filed a notice of appeal from the convictions, but later moved to stay the appeal and remand to the district court for postconviction proceedings, and this court granted the motion. Goldtooth subsequently filed a petition for postconviction relief, arguing that (1) he was deprived of his right to be present at every critical stage of the proceedings; (2) the district court abused its discretion by denying his discovery motion without conducting an in camera review of C.L.'s records; and (3) the state committed a discovery violation by failing to disclose relevant information. In the alternative, Goldtooth argued that he received ineffective assistance of counsel. The postconviction court denied Goldtooth's petition without holding an evidentiary hearing. This consolidated appeal followed.

DECISION

I.

Goldtooth challenges the postconviction court's denial of his petition for postconviction relief and his request for an evidentiary hearing. "When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, [appellate courts] review the postconviction court's decisions using the same standard that [they] apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn.2012). When reviewing a postconviction court's denial of relief, "[t]he scope of [an appellate court's] review of factual matters is to determine whether there is sufficient support in the record to sustain the postconviction court's findings." *State v. Nicks*, 831 N.W.2d 493, 503 (Minn.2013). We review the postconviction court's factual findings for clear error and review its legal conclusions de novo. *Id.* "Ultimately, [appellate courts] review a denial of a petition for postconviction relief, including a denial of relief without an evidentiary hearing, for an abuse of discretion." *Id.* "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). A district court must set a hearing on a petition for postconviction relief "[u]nless the petition and the files and records of the

proceeding conclusively show that the petitioner is entitled to no relief." Minn.Stat. § 590.04, subd. 1 (2014).

Right to Be Present at Every Stage of the Proceedings

***2** Goldtooth first argues that he was deprived of his due process right to be present at every critical stage of the trial proceedings. Specifically, he claims that he was not present on March 6, at which time, according to an affidavit of his trial attorney, arguments regarding his discovery motion were held in chambers. As further support for this allegation, in his petition Goldtooth referenced the district court's March 14, 2014 order denying Goldtooth's discovery motion, which indicates that the matter came before it on March 6, 2014. In denying Goldtooth's petition, the postconviction court stated that the reference to March 6, 2014, was a clerical error and that the discovery motion was argued in open court on March 10, 2014, in Goldtooth's presence. [1]

[1] We note that the same judge presided over Goldtooth's trial court proceedings and denied his postconviction petition.

A defendant in a criminal proceeding has a constitutional right under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to be present "at all critical stages of trial." *Ford v. State,* 690 N.W.2d 706, 712 (Minn.2005); *see also United v. Gagnon,* 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985). A critical stage of trial includes any proceeding where "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *State v. Booker,* 770 N.W.2d 161, 165 (Minn.App.2009) (alteration omitted) (quotations omitted), *review denied* (Minn. Oct. 20, 2009). Minn. R.Crim. P. 26.03 also provides that a defendant must be present at arraignment, plea, and for every stage of trial, including jury selection, opening statements, presentation of evidence, closing arguments, jury instruction, any jury questions dealing with evidence or law, the verdict, and sentencing.

Goldtooth has not cited to a case that expressly holds that a discovery motion is a critical stage of a trial, and rule 26.03 does not specifically list a discovery motion as requiring his presence. Assuming his presence would provide a reasonably substantial relation to his opportunity to defend himself against the charge and reading rule 26.03 broadly to require his presence at every stage of trial, Goldtooth argues that he should have been present for the hearing on the discovery motion. However, we are not required to resolve this legal issue. Here, the postconviction court ruled that, based upon its review of the record, Goldtooth *was* present during the arguments regarding his discovery motion. The issue, then, is not whether Goldtooth had a right to be present at the discovery motion arguments, but whether the postconviction court abused its discretion by determining that the record conclusively shows that the discovery motion was heard in open court in Goldtooth's presence and denying his petition.

The record indicates that at a pretrial hearing on September 16, 2013, Goldtooth's attorney, acknowledging that he had just received 140 or 150 pages of discovery from the state, requested a trial date in early February 2014. However, on January 29, 2014, Goldtooth's attorney moved for a continuance of the trial until the state delivered "all requested discovery to the court for *in camera* review to determine what c[ould] be properly used." In a request for additional discovery filed the next day, Goldtooth demanded, among other things, that the state produce all of the records of C.L .'s encounters or communication with child protection or law enforcement, her complete educational and psychological testing records, and all of her hospitalization records.

***3** In a settlement conference attended by Goldtooth on February 3, 2014, Goldtooth's attorney acknowledged that "a good deal" of his discovery request had already been provided by the state, but stated that in his self-described "sort of a scattershot blanket request," he wanted the district court to provide a protective order and do an in camera review of any further records that were disclosed. Goldtooth's attorney explained that he wanted information for impeachment of C.L. regarding her propensity for making false allegations of sexual assault. There is no evidence that Goldtooth's attorney had any information that C.L. had ever made a previous false allegation of sexual abuse. At the settlement conference, after both parties had acknowledged C.L.'s privacy rights related to Goldtooth's discovery, the district court indicated that it wanted to protect those rights and limit the inquiry "into areas of [ ] [C.L.'s] life that do not have relevant evidence that would be pertinent," but might also have "embarrassing, or very personal information" that "would not be admissible under the Minnesota statutes or the [r]ules of [p]rocedure." The district court instructed the state to file any documents for an in camera review regarding their admissibility by February 20.

On February 20, 2014, the state filed a memorandum in opposition to Goldtooth's request for additional discovery, claiming that the request was vague and overly broad, and

that the requested information was irrelevant. The state also argued that C.L.'s medical, psychological, treatment, and child protection records were privileged, private data, and not subject to disclosure under the Confrontation Clause or the Due Process Clause. On that same date, the state responded to the discovery request, stating that it had already disclosed much of the requested information to Goldtooth and that if Goldtooth was requesting further information, a more specific request would be needed to adequately respond. On March 7, 2014, the state provided the district court with 11 pages of documents that had not been previously provided to the defense for an in camera review by the district court.

According to the record, the parties presented their arguments regarding Goldtooth's discovery motion in open court on March 10. Both the court minutes and the district court's subsequent order indicate that Goldtooth was present during the arguments.

There is no evidence in the record that any proceeding was noticed or scheduled on the court calendar for March 6 nor is there any transcript of any hearing or listing of any proceeding in the register of actions that took place on that date. Based upon this record, and the postconviction court's acknowledgment that the March 6 reference was a clerical error, we conclude that the postconviction court did not abuse its discretion by determining that the record conclusively shows that Goldtooth is entitled to no relief on this ground. *See Wallace v. State*, 820 N.W.2d 843, 850 (Minn.2012) (stating that claim is "indisputably meritless" when record completely contradicts it).

Right to Discovery

***4** Goldtooth also claims that his petition for postconviction relief should have been granted on the basis that he was not able to defend himself at trial because of the district court's evidentiary ruling on his discovery motion. After the in camera review by the district court of the state's remaining documents that had not been previously provided to the defense, the district court ruled that Goldtooth was entitled to the discovery of one page out of the 11 pages of the state's documents and that the remaining ten pages, which contained mental health, medical, and treatment information concerning C.L., were not disclosable. The district court also denied Goldtooth's request for discovery from the state regarding additional mental health, medical, and treatment information encompassing "the entire span of [C.L.'s] life," noting that the request was "devoid of scope, time frame, or any narrowing factors whatsoever" and that there was no "indication of how the sought information" would relate to the case. The district court explained that "[t]he discovery rules are not meant to be used as a pole and bait for a personal fishing expedition, especially as it relates to confidential data of a minor alleged to have been the victim of criminal sexual conduct." In denying Goldtooth's motion, the district court reminded the state of its responsibility under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Minn. R.Crim. P. 9.01 to disclose discovery that related to the case.

"There is no general constitutional right to discovery in a criminal case...." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). Discovery in criminal cases is governed by the criminal rules and is more limited than discovery in civil cases. *See State v. Deal*, 740 N.W.2d 755, 760–61 (Minn.2007). The rules of criminal procedure regarding discovery "are intended to give the parties complete discovery subject to constitutional limitations." Minn. R.Crim. P. 9 cmt.

Goldtooth does not dispute that the records he seeks are private and subject to the Minnesota Government Data Practices Act or other legislation. *See* Minn.Stat. § 13.32 (2014) (protecting educational data); Minn.Stat. § 13.384 (2014) (protecting medical data); Minn.Stat. § 13.46, subd. 2 (2014) (protecting welfare data); Minn.Stat. § 13.46, subd. 7 (2014) (protecting mental health data); Minn.Stat. § 13.822 (2014) (protecting sexual assault communication data); Minn.Stat. § 260B.171, subd. 4 (2014) (protecting juvenile court records); Minn.Stat. § 260C.171 (2014) (protecting child protection records). When a defendant requests private records that are protected by legislation, such as the Minnesota Government Data Practices Act, the district court may conduct an in camera review in order "to balance the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn.2012). In order to receive an in camera hearing a defendant must "establish a plausible showing that the information sought would be both material and favorable to his defense." *Id.* (quotations omitted). A district court's ruling on discovery requests rests within its broad discretion and will not be reversed absent a clear abuse of that discretion. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn.2009).

***5** We conclude that the postconviction court did not err by determining that Goldtooth was not entitled to additional records from the state for another in camera review by the district court. First, we note that the state provided extensive

discovery to Goldtooth. At the March 10, 2014 hearing of Goldtooth's discovery motion, the state indicated that it had no other documents in its possession and that the documents it possessed had either been provided to Goldtooth's attorney or submitted to the district court. In response to the parties' arguments regarding the discovery motion, the district court noted that Goldtooth was improperly attempting to "force law enforcement to act as its own investigator" and that it would perform an in camera review of the 11 pages that had been submitted to it by the state.

Goldtooth argues that he is entitled to an in camera review of C.L.'s mental health, treatment, school, and child protection records. This argument presupposes that there is additional discovery to be disclosed. On appeal, the state maintains that there was no other discovery available to the state and that it disclosed everything in its possession. A prosecutor's disclosure obligations "extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to the prosecutor's office." Minn. R.Crim. P. 9.01, subd. 1a(1). We acknowledge that it is possible that some of the records requested by Goldtooth may fall within the prosecutor's disclosure obligations. However, there is no indication in the record, and Goldtooth does not argue, that any further discovery was in the state's possession or control but not disclosed.

To the extent that Goldtooth is impliedly arguing that the prosecutor had a duty to seek out the requested additional discovery for his defense, we reject this argument. Many of the records requested by Goldtooth, specifically C.L.'s mental health, treatment, and school records, likely do not fall within the scope of the prosecutor's required disclosure under rule 9.01.[2] If Goldtooth wanted the entities holding these records to disclose their records to him, he could have attempted to obtain them by subpoena. *See* Minn. R.Crim. P. 22.01, .02 (2014).[3] But, Goldtooth failed to subpoena these records. Therefore, he cannot now circumvent his failure to subpoena the third parties by claiming that the state committed a discovery violation by not obtaining records outside of its possession and control.

2 We acknowledge that it is possible that some of these records could fall within the prosecutor's disclosure obligation, depending on what entity is in possession of the records and its relationship with the prosecutor's office. Minn. R.Crim. P. 9.01, subds. 1a(1), 2(1).

3 In 2015, after Goldtooth's 2014 trial, Minn. R.Crim. P. 22.01 was amended to provide specific guidance on this issue. Minn. R.Crim. P. 22.01, subd. 2(c) (Supp.2015) now provides:

> A subpoena requiring the production of privileged or confidential records about a victim as defined in Minnesota Statutes, section 611A.01, paragraph (b), may be served on a third party only by court order. A motion for an order must comply with Rule 10.03, subdivision 1. Before entering the order, the court may require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

Second, even if the state was in possession of the requested discovery or if Goldtooth had attempted to subpoena such records, the district court properly determined that Goldtooth failed to make a plausible showing that the information he was seeking would be material and favorable to his defense. In his discovery request, Goldtooth broadly requested all school, hospital, psychological, counseling, child protection, and law enforcement records of C.L., without indicating any theories regarding how the records could relate to the defense or why the records were reasonably likely to contain information related to the case. The postconviction court determined, and Goldtooth concedes, that Goldtooth's written motion did not establish the required plausible showing. Goldtooth contends, however, that his attorney made a plausible showing on March 6 during arguments that took place in chambers and were not on the record. But, as discussed above, there is no support in the record that any proceeding was scheduled or took place on March 6. And, Goldtooth concedes that he made no plausible showing at the March 10 oral argument on the discovery motion.

***6** The record of the settlement conference on February 3 reflects that Goldtooth's trial counsel indicated during the discussion of his discovery motion that he wanted information regarding C.L.'s propensity to make false allegations. But, given the state's provision of all the records in its possession and this minimal plausible showing made by Goldtooth at the settlement conference, the district court did not abuse its discretion by denying Goldtooth's motion for additional discovery of C.L.'s school, medical, child protection, and law enforcement records for her entire lifetime. And, given that

the plausible showing made in the affidavit of Goldtooth's trial counsel was not presented to the district court, but rather was presented for the first time to the postconviction court, we conclude that the postconviction court did not abuse its discretion by concluding that Goldtooth was not entitled to in camera review of additional records by the district court prior to his trial.

Violation of Discovery Rules

Next, Goldtooth argues that he was entitled to an evidentiary hearing on the issue of whether the state violated discovery rules by failing to disclose C.L.'s treatment, mental health, and child protection records when it intended to introduce evidence that C.L. claimed that she suffered from posttraumatic stress disorder as a result of being sexually assaulted. Appellate courts review whether a discovery violation occurred de novo. *State v. Palubicki,* 700 N.W.2d 476, 489 (Minn.2005). Minn. R.Crim. P. 9.01, subd. 1, provides that the state must "allow access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case." The state must disclose "[t]he results or reports of physical or mental examinations ... that relate to the case." Minn. R.Crim. P. 9.01, subd. 1(4)(a).

As discussed above, while Goldtooth requested "any and all psychological or counseling evaluations" of C.L. and records of "[a]ny and all encounters of [C.L.] with child protection," the district court denied the request, reasoning that the defense had "made an overly-broad, voluminous request for documents that have no relation to the case at hand."

At trial, when testifying regarding her living situation, C.L. testified that she was living in a group home because of her drug abuse. In response to the prosecutor's question if she had been treated for anything else at the group home, C.L. indicated that she had been treated for her "trauma, PTSD." C.L. indicated, in response to the prosecutor's questions, that PTSD stands for posttraumatic stress disorder and that she suffered from PTSD as a result of "sexual abuse." Goldtooth argues that the testimony elicited by the state reveals that the state knew that the mental health records were relevant, intentionally introduced evidence that C.L. suffered from mental illness at trial, and therefore committed a discovery violation by failing to disclose those records.

*7 The district court had already denied Goldtooth's discovery request as overbroad and had ruled that all but one of the 11 pages submitted by the state for in camera review were inadmissible. And, there is no indication that the state had any other discovery in its possession. [4] Additionally, as the postconviction court observed, although the state deliberately elicited testimony that C.L. suffered from PTSD that was caused by sexual abuse, the state's brief questions on PTSD were isolated and the state did not dwell on C.L.'s mental health. Goldtooth did not object to the prosecutor's questions at trial and, on appeal, raises no other arguments regarding the prosecutor's elicitation of this testimony. Under these circumstances, the postconviction court did not abuse its discretion by determining that the record conclusively showed that Goldtooth is not entitled to postconviction relief on this ground.

4 While Goldtooth argues that the state committed a discovery violation, we are satisfied that, after our review of the documents disclosed by the state, including the 11 pages submitted to the district court for in camera review, this argument is without merit. Moreover, given the arguments presented to the district court at the time, we cannot say that the district court abused its discretion by determining that ten of the pages submitted for in camera review were not disclosable to the defense. *See Hokanson,* 821 N.W.2d at 350 (concluding that, after reviewing the documents submitted to the district court for an in camera review, the district court did not abuse its discretion by determining that certain documents were not disclosable to defense).

Ineffective Assistance of Counsel

Goldtooth argues that he is entitled to a hearing on his claim of ineffective assistance of counsel if this court determines that his trial counsel failed to make a plausible showing that the information sought would be material and favorable to his defense. Goldtooth argues that his counsel's failure to make such a showing resulted in his receiving inadequate discovery.

In order to receive a new trial on the ground of ineffective assistance of counsel a "defendant must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State,* 398 N.W.2d 558, 561 (Minn.1987) (quotations omitted). "The petitioner bears the burden of proof on an ineffective assistance of counsel claim, and there is a strong presumption that counsel's performance fell within a wide

range of reasonable assistance." *Bruestle v. State,* 719 N.W.2d 698, 705 (Minn.2006) (quotations omitted). Appellate courts review claims of ineffective assistance of counsel de novo because they involve mixed questions of law and fact. *Dobbins v. State,* 788 N.W.2d 719, 728 (Minn.2010).

Goldtooth concedes that his written motion failed to make a plausible showing, but the record indicates that, at the settlement conference on February 3, 2014, his trial counsel narrowed his request to information regarding C.L.'s propensity to make false allegations of sexual misconduct. In response, the district court acknowledged that, generally, such information might be relevant and admissible.

Even assuming that Goldtooth's trial attorney did not make a plausible showing and that such a failure was objectively unreasonable, Goldtooth cannot show that there is a reasonable probability that the result of the proceeding would have been different if his trial counsel had attempted to make a stronger plausible showing. If Goldtooth made a plausible showing, the district court would have then reviewed the requested information in camera, balancing "the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy." *Hokanson,* 821 N.W.2d at 349. Assuming that the district court determined that some of these requested records were relevant to the charges against Goldtooth and his right to prepare a defense outweighed C.L.'s right to privacy, the evidence could, according to Goldtooth, provide support for his arguments regarding C.L.'s motive to fabricate allegations of misconduct. In his affidavit, Goldtooth's trial counsel states that the defense at trial was that C.L. could be fabricating the allegations due to a combination of four possible theories: (1) she wanted to live with her grandmother, rather than with her mother and Goldtooth; (2) she was angry with her mother given the severe dysfunction present in the family; (3) she was trying to deflect blame from her escalating delinquent behavior; and (4) she invested herself in the fabrications during treatment and came to believe them.

***8** But, C.L. admitted at trial that she had behavior and drug problems and grew up in a dysfunctional and abusive environment, noting that she had a nonexistent relationship with her mother and that they had never been close. C.L. also testified that she "never really liked" Goldtooth, that he "didn't come off as a nice person," and that her mother tried to push her into a father-daughter relationship with Goldtooth that she did not want. C.L. testified that she got into arguments with Goldtooth when she lived with him and her mother. Goldtooth testified that C.L. and her sisters were happy living with their grandmother and that C.L. had a poor relationship with her mother, including the fact that C.L. had threatened her mother. Moreover, Goldtooth had the opportunity to cross-examine C.L., her mother, and her grandmother regarding C.L .'s relationship with her mother, her preferred living arrangements, and her behavior. Based upon this testimony and Goldtooth's opportunity to cross-examine C.L., Goldtooth had the opportunity during trial to argue that C.L. had a motive for fabricating the sexual assault. Under these circumstances, there is no reasonable probability that the result of the trial would have been different if Goldtooth's trial counsel had made a stronger plausible showing.

In sum, as the petition, files, and record conclusively show that Goldtooth is not entitled to relief, we conclude that the postconviction court did not abuse its discretion by denying Goldtooth's petition without an evidentiary hearing.

II.

In his direct appeal from his conviction, Goldtooth argues that the district court deprived him of his due process right to present a defense by excluding certain evidence. Due process requires that a criminal defendant be given "a meaningful opportunity to present a complete defense." *Carlton v. State,* 816 N.W.2d 590, 614 (Minn.2012) (quotation omitted). Appellate courts "review evidentiary rulings under an abuse of discretion standard even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty,* 708 N.W.2d 185, 201 (Minn.2006).

Evidence of Other Sexual Abuse

First, Goldtooth argues that the district court abused its discretion by excluding evidence of other sexual abuse in the home where he and C.L. lived. Goldtooth sought to testify that another individual had sexually assaulted C.L.'s sister in the home at some point. The state objected to this evidence on the grounds of relevance, and Goldtooth argued that the evidence was relevant to show that the police failed to investigate red flags and to show that there was an atmosphere of sexual activity in the home. The district court sustained the objection.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Goldtooth asserts that he was not attempting to introduce this testimony as alternative perpetrator evidence, but as an explanation for why C.L. would choose to fabricate a claim of sexual abuse. We conclude that the district court did not abuse its discretion in excluding this evidence as irrelevant, especially as there appears to be no evidence in the record indicating that C.L. knew of the alleged sexual assault of her sister.

Evidence of C.L. Threatening Her Mother

***9** Next, Goldtooth argues that the district court abused its discretion by excluding evidence that, a few months before disclosing that Goldtooth had sexually assaulted her, C.L. threatened in a letter to make her mother's life "a living hell." The district court excluded this testimony during direct examination of B.L., C.L.'s mother, on the ground of relevance, and during direct examination of Goldtooth, on the ground of hearsay. Goldtooth was unable to present the letter in which C.L. allegedly made these statements.

"Relevant evidence is generally admissible." *State v. McArthur*, 730 N.W.2d 44, 51 (Minn.2007); *see also* Minn. R. Evid. 402. Because it is probative of witness credibility, bias is almost always relevant. *McArthur*, 730 N.W.2d at 51. Hearsay is generally not admissible. Minn. R. Evid. 802. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). An out of court statement offered for the impeachment purpose of showing bias of a witness, rather than the truth of the matter asserted, is not hearsay. *See State v. Carillo*, 623 N.W.2d 922, 928 (Minn.App.2001) (concluding that it was error for district court to exclude as hearsay testimony offered for impeachment purpose to show bias where witness offered to revise testimony for payoff), *review denied* (Minn. June 19, 2001).

C.L.'s alleged statement that she was going to make her mother's life "a living hell" was offered for the impeachment purpose of showing C.L.'s motive for fabricating allegations against Goldtooth, her mother's boyfriend. Because the testimony regarding the letter tends to show that C.L. had a motive for fabricating allegations against Goldtooth, the district court's exclusion of the evidence was erroneous.

Minnesota appellate courts apply two different harmless error tests for determining whether the defendant was prejudiced by the admission of evidence, depending on whether the district court's erroneous admission of evidence implicates a constitutional right. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn.2009).

> When the error implicates a constitutional right, a new trial is required unless the [s]tate can show beyond a reasonable doubt that the error was harmless. An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error. When the error does not implicate a constitutional right, a new trial is required only when the error substantially influenced the jury's verdict.

Id. (citations omitted). Goldtooth contends that the heightened harmless error test that applies to errors implicating constitutional rights applies, presumably because he is arguing that the district court's erroneous exclusion of C.L.'s threat to make her mother's life "a living hell" as hearsay denied him his due process right to present a defense. It is unnecessary for this court to determine which of the harmless error tests apply because the district court's error was harmless even under the heightened harmless error test.

***10** Any error in excluding the testimony that C.L. threatened to make her mother's life "a living hell" or in excluding the evidence of other sexual abuse in the home is harmless beyond a reasonable doubt. Goldtooth sought to introduce this evidence in order to show C.L.'s potential motive for fabricating allegations of sexual abuse. Goldtooth, however, testified regarding C.L.'s deteriorating relationship with her mother, and C.L. testified that she had "no relationship" and had never had a relationship with her mother. Additionally, Goldtooth testified that he was aware that C.L. had threatened her mother. Under these circumstances, there is no reasonable probability that the verdict might have been different if the evidence had been admitted because both Goldtooth and C.L. testified regarding C.L.'s troubled relationship with her mother.

In sum, while the district court abused its discretion by excluding as hearsay evidence offered for the purpose of

impeaching C.L., any error in excluding the testimony was harmless. Therefore, the district court did not deprive Goldtooth of his due process right to present a defense.

Affirmed.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Linden Gene MCKINNEY, Appellant.

A20-0673

Filed April 26, 2021

Ramsey County District Court, File No. 62-CR-19-3335

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Considered and decided by Gaïtas, Presiding Judge; Larkin, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

***1** Appellant challenges his conviction of first-degree criminal sexual conduct, assigning error to the district court's admission of relationship evidence under Minn. Stat. § 634.20 (2018), allowance of expert testimony, and exclusion of evidence supporting his theory of the case. He also argues that the jury pool did not reflect a fair cross-section of the community. We affirm.

FACTS

Respondent State of Minnesota charged appellant Linden McKinney with one count of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct. The complaint alleged that after C.L. ended her six-year relationship with McKinney, McKinney sexually assaulted her when he came to her home to pick up his belongings.

The state presented evidence at trial that C.L. began dating McKinney in 2012. In February 2018, the couple had a child together. C.L. testified that the relationship was "rocky," that McKinney was verbally and physically abusive, and that the abuse increased over time. She described several incidents in which McKinney punched, strangled, kicked, and stomped on her. C.L. also testified McKinney pushed her through a window in April 2019.

C.L. testified that she broke up with McKinney in April 2019, but she told him that "he could basically stay [with her] to watch the baby and get on his feet." On May 4, 2019, C.L. and McKinney argued and then engaged in consensual sexual activity. The next morning, the two argued again. According to C.L., McKinney choked her until she "felt [her] body just go limp."

C.L. claimed that the fighting woke up the baby, prompting McKinney to "allow[ ]" her to change the baby and make the baby breakfast. According to C.L., McKinney told her that he was "going to hold [her] hostage all day" and make her take three ecstasy pills. C.L. testified that as she was making the baby breakfast, McKinney spit on her "two to three times ... in the face," and tried to break her cell phone.

C.L. testified that after she changed and fed the baby, she called her sister "to get her to the house because I knew if I could get her to the house, I could let her know that something was going on and get us out." C.L. also testified that, after she called her sister, McKinney "basically lets me know that we're about to have sex and asks if I'm going to cooperate or if he needs to drug me." According to C.L., McKinney then straddled her, put his penis in her mouth, and eventually ejaculated in her mouth. C.L. stated that McKinney then had vaginal sex with her and, after she started crying, he put a pillow over her head and threatened to drug her. C.L. further testified that she did not want to have sex with McKinney and

that "[h]e knew that." C.L. denied consensually engaging in rough sexual activity with McKinney.

After McKinney finished, he put a Taser on the bed between them so that C.L. would not leave. When McKinney fell asleep, C.L. took the baby and ran down the street towards her mother's house. C.L. called her sister on the way and told her that she needed to be picked up before McKinney caught her and killed her. Around this time, C.L.'s mother called C.L., and C.L. told her mother that McKinney "raped me and tried to kill me."

***2** C.L.'s sister found C.L. and the baby and drove them to their parents' house. C.L. then called 911 and reported that McKinney had raped and strangled her. Officer Ilya Tereshko responded to the call. C.L. told the officer that she and McKinney had an argument that culminated in McKinney choking her, threatening to drug her, and then making her have oral and vaginal sex with him. As C.L. spoke with Officer Tereshko, McKinney sent C.L. a message stating: "Dam U got away."

Police went to C.L.'s residence, where they found McKinney hiding under the bed. McKinney was arrested and, as he was transported to jail, he told Officer Tereshko that he had argued with C.L. the night before and that he choked C.L. while having "rough" make-up sex that morning. McKinney told the officer that it was "not unusual" for them to have "rough sexual intercourse" and that C.L. "frequently" requests to be choked during sex. During an interview with investigators the next day, McKinney reasserted that he and C.L. had consensual "rough make-up sex" on May 5.

C.L. was examined by a sexual assault nurse examiner (SANE). The SANE testified that during the examination, C.L. described prior incidents of domestic abuse that culminated with the events that occurred on May 5. The SANE further testified that C.L. described the events on May 5, which include McKinney strangling C.L. and later forcing her to engage in oral and vaginal sex.

The state presented evidence that, after McKinney was charged with criminal sexual conduct, the district court issued a no-contact order prohibiting him from contacting C.L. The state also introduced evidence that, despite the existence of the no-contact order, McKinney repeatedly called and exchanged electronic messages with C.L. During those exchanges, McKinney admitted that he "made a mistake" and stated that he was "probably going to get hung." He begged for C.L.'s forgiveness, asked C.L. to change her story, and threatened C.L. if she were to testify against him. Moreover, in one of the phone calls, McKinney told C.L.: "I am asking you to straight flat out lie, let's be honest because what I did was straight out rape. What I did, abuse. What I did was disrespectful and so many other things." In another call with C.L., McKinney stated: "Linden Gene McKinney raped you," and "I raped [C.L.] in front of our son." During the same call, McKinney stated: "I'm going to say it again out loud ... so I can help incriminate myself. Linden Gene McKinney ... raped [C.L.] on May 5, 2019, which is, and he spit on her, he did all the things that those two investigators, he did everything that they said he did."

McKinney testified that he had a "rocky" relationship with C.L. and acknowledged being "physical" with C.L. in the past, but he denied that he had ever abused her. McKinney also testified that he and C.L. engaged in consensual, rough sex that involved hair pulling, biting, and choking. He claimed that C.L. would pretend to be his "sex slave." McKinney denied ever choking C.L. "outside of a sexual encounter."

McKinney testified that on the night of May 4, he and C.L. engaged in consensual sex that was "on the rougher end" and that the two engaged in sex again the next morning. According to McKinney, C.L. later "flip[ped] out" after he told her that he had received a "blow job at work" from a coworker. McKinney testified that he told C.L. that he was joking and that the two had consensual, rough "make-up sex," which included both oral and vaginal sex. McKinney stated that when they were done, he fell asleep, and woke up to find C.L. gone.

***3** McKinney denied spitting on C.L., threatening to drug her, or putting a Taser on the bed. But he admitted that he lied to police about sending the message: "Dam U got away." He claimed that the message was an "insider joke" referencing their "role-playing." McKinney also admitted that he tried to persuade and frighten C.L. into retracting what he claimed were false allegations of sexual assault. Evidence was presented that C.L. told McKinney that she would do what she could to help him avoid going to prison.

The jury found McKinney guilty as charged. The district court sentenced McKinney to 208 months in prison and ten years of conditional release for the first-degree criminal-sexual-conduct offense. McKinney appeals.

DECISION

I.

McKinney contends that the district court erred by admitting, under Minn. Stat. § 634.20, evidence regarding McKinney and C.L.'s six-year relationship. A district court's evidentiary ruling is reviewed for an abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997).

Prior to trial, the state moved to introduce evidence "regarding the history of the relationship" between C.L. and McKinney to provide "context" regarding why the charged incident occurred. The district court, over McKinney's objection, ruled that the relationship evidence was admissible under Minn. Stat. § 634.20, because it was "relevant to provide a context of their relationship." The district court repeatedly instructed the jury regarding the proper use of the relationship evidence. The court provided those instructions three times during C.L.'s testimony, prior to her testimony describing specific incidents of abuse, and again before closing arguments.

Minn. Stat. § 634.20 is a rule of evidence that allows for the admission of evidence of domestic conduct by the defendant against the victim or other family or household members. *State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015). The statute provides that "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20. "Domestic conduct" includes, among other things, "evidence of domestic abuse." *Id.* "Domestic abuse" includes "physical harm, bodily injury, or assault," if committed against a family or household member. Minn. Stat. § 518B.01, subd. 2(a)(1) (2018); *see also* Minn. Stat. § 634.20 (incorporating that definition of domestic abuse).

McKinney argues that the district court abused its discretion by admitting evidence regarding his prior abuse of C.L. because the probative value of that evidence was substantially outweighed by the danger of unfair prejudice. Specifically, he argues that the relationship evidence "had little probative value because the state did not need the evidence." McKinney also argues that the evidence had little probative value because the "only disputed issue of consequence ... was whether [C.L.] consented to having rough sex with McKinney" on the date of the alleged sexual assault, and the "extensive testimony detailing their six-year relationship" does not make it more likely that a sexual assault occurred.

"[T]he rationale for admitting relationship evidence under section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). Relationship evidence "is relevant because it illuminates the history of the relationship between the victim and defendant and may also help prove motive or assist the jury in assessing witness credibility." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010) (quotation omitted). Relationship evidence under section 634.20 involving a family or household member has a high probative value because it demonstrates how the defendant interacts with people close to him. *State v. Ware*, 856 N.W.2d 719, 729-30 (Minn. App. 2014).

***4** In this case, the relationship evidence provided context for the alleged offense. That context was relevant because the jury heard that even though C.L. had broken up with McKinney, she had consensual sex with him the night before the charged offense. The jury also heard that even though C.L. had accused McKinney of sexual assault, she continued to communicate with him. As McKinney acknowledges, this was a he-said-she-said case. Evidence regarding the nature of the parties' relationship helped explain C.L.'s conduct before and after the sexual assault, which was relevant to an assessment of her credibility. Although McKinney asserts that the "state did not need the evidence" because its case against McKinney was strong, the relationship evidence was highly probative because it assisted the jury in evaluating the parties' credibility.

McKinney argues that, in light of the "sheer quantity of relationship evidence," any probative value of this evidence was substantially outweighed by the danger of unfair prejudice. But "unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Id.* at 729 (quotation omitted). And the danger of unfair prejudice is low when the district court provides a limiting instruction to the jury. *Id.* at 730.

We acknowledge that the relationship evidence was prejudicial to McKinney's case; all damaging evidence is. But McKinney fails to establish that the evidence persuaded

by illegitimate means or gave the state an unfair advantage. Moreover, the district court repeatedly instructed the jury regarding the limited use of the relationship evidence, which mitigated the danger of unfair prejudice. *See id.* Given the probative value of the relationship evidence and the district court's provision of limiting instructions regarding the proper use of that evidence, we conclude that the relationship evidence did not persuade by illegitimate means. In sum, the district court did not abuse its discretion by admitting the relationship evidence.

II.

McKinney contends that the district court erred by allowing the SANE to provide expert testimony about "the cycle of domestic abuse, the correlation between domestic abuse and sexual assault, and the 'Power and Control Wheel.' " A district court's decision to admit expert testimony is reviewed for an abuse of discretion. *State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020). A defendant challenging the admission of evidence must show that the district court abused its discretion and that he was prejudiced as a result. *Nunn*, 561 N.W.2d at 907.

Prior to trial, the state noticed its intent to elicit testimony from the SANE describing the cycle of domestic abuse, the correlation between domestic abuse and sexual assault, and the "Power and Control Wheel." The district court, over McKinney's objections, ruled that the SANE's testimony was admissible, with some limitations.

The SANE testified that domestic abuse involves a recurring cycle of violence that can overlap with sexual assault. She also testified about the "Power and Control Wheel" that therapists use to educate domestic-assault victims about how abusers use isolation, money, abuse, children, and guilt to control their victims. And the SANE described how the brain works when a person experiences a traumatic event.

Minnesota Rule of Evidence 702 governs the admissibility of expert testimony. Under that rule, "expert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it satisfies the *Frye-Mack* standard." *Garland*, 942 N.W.2d at 741-42 (quotation omitted).

McKinney argues that the state failed to show that the first three prongs are satisfied. He also contends that he was prejudiced by the erroneous admission of this evidence. We address each argument in turn.

The SANE's Qualifications as an Expert

***5** An expert witness is one who is qualified by "knowledge, skill, experience, training or education" to testify about and provide an opinion regarding "scientific, technical or other specialized knowledge." Minn. R. Evid. 702. An expert's qualifications are not required to stem solely from formal training, but the expert's qualifications must be based on some "knowledge, skill, or experience that would provide the background necessary for a meaningful opinion on the subject." Minn. R. Evid. 702 1977 comm. cmt. We afford district courts broad discretion in determining whether to admit or exclude expert testimony. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

McKinney acknowledges that the SANE's "education and experience qualify her to testify about nursing and proper forensic interviewing techniques." (Emphasis omitted.) But McKinney argues that, because she is not a doctor, psychologist, or psychology professor, the SANE's testimony improperly "delved into social science theories about domestic abuse and domestic abusers, correlations between domestic abuse and sexual assault, and the workings of the brain." [1]

[1] The state asserts that McKinney forfeited this argument by generally objecting to the SANE's qualifications prior to trial and then failing to make specific challenges to the SANE's qualifications at trial. *See State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000) (stating that, in general, only "clear and specific objections raised before the district court" will preserve the issue of admissibility of evidence for appeal). Before trial, McKinney specifically challenged the SANE's qualifications to testify about the psychological aspects of domestic abuse, arguing that the SANE was not a psychologist and did not have training in that area. At trial, McKinney repeatedly objected to the SANE's testimony related to the psychological aspects of domestic abuse. We are satisfied that McKinney preserved the issue for appellate review.

Although the SANE was not a doctor or psychologist, McKinney cites no case indicating that only doctors and

psychologists are qualified to testify about the psychological aspects of domestic abuse. Indeed, the SANE testified that she received specialized training to become a SANE; that the training includes "trauma training," involving how the trauma affects the brain; that the training is "ongoing"; and that she has performed over 400 sexual-assault examinations. The SANE also described how the trauma training applies to her work. Thus, the record supports the district court's determination that the SANE was qualified to testify about the psychological aspects of domestic abuse.

Foundational Reliability

"When determining whether an opinion is foundationally reliable under Rule 702, the district court must analyze the proffered testimony in light of the purpose for which it is being offered and consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying." *Garland*, 942 N.W.2d at 742 (quotation omitted). The standard for foundational reliability "goes beyond a mere helpfulness standard." *Id.* (quotation omitted). Rather, foundational reliability "is a concept that looks to the theories and methodologies used by an expert." *Id.* (quotation omitted).

Here, the SANE testified that domestic abuse involves a recurring cycle of violence that can overlap with sexual assault. She also testified that sexual-assault victims describe their assaults inconstantly and in sensory terms because of the way the brain works when a person is experiencing trauma.

***6** McKinney argues that this testimony lacked foundational reliability because the state presented no evidence from which the district court could independently assess the reliability of the SANE's assertions.[2] We agree. The SANE did not cite support for her testimony that domestic abusers sexually assault their victims, and the state presented no evidence to support that theory. The SANE also did not cite scientific data to support her opinion related to the effects of domestic abuse on domestic-abuse victims' brains. Given the lack of evidence regarding the theories and methodologies on which the SANE relied, the SANE's testimony that domestic abuse overlaps with sexual assault lacked foundational reliability.

2 The state again asserts that such arguments are forfeited because McKinney's objections at trial were not specific. But the record reflects that prior to trial, McKinney specifically challenged the foundational reliability of the SANE's testimony as it pertained to the percentage of domestic abusers who sexually assault their victims. And McKinney repeatedly objected to the SANE's testimony at trial on the basis of foundation. Once again, we are satisfied that McKinney preserved the issue for appellate review.

Helpfulness of the SANE's Testimony

"Expert testimony is not helpful if the expert opinion is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions." *Id.* at 746 (quotation omitted). Stated differently, "if the jury can reach an informed conclusion just as easily as the expert, the expert's testimony is not helpful to the jury." *Id.*

McKinney argues that the SANE's testimony about the "Power and Control Wheel," the recurring "cycle of abuse," and the correlation between domestic abuse and sexual assault, was not helpful because it focuses on the characteristics of a domestic abuser and how domestic abusers behave. McKinney argues that this evidence is akin to improper character evidence because it suggests that domestic abusers are the type of people who are likely to commit sexual assault.

To support his position, McKinney relies on *State v. Williams*, 525 N.W.2d 538 (Minn. 1994). In that case, police officers testified regarding the typical behavior of drug couriers, including the manner in which they purchase tickets for travel, the cities from which they depart, and other typical travel behaviors. *Williams*, 525 N.W.2d at 548. The supreme court compared this profile evidence to evidence of typical characteristics of child abusers. *Id.* The supreme court observed that such evidence is similar to character evidence because it invites the jury to infer that, if the defendant's conduct fits the profile, then it is probative evidence that he is a drug courier. *Id.* at 547-48. Thus, the supreme court concluded that police testimony regarding the typical behavior of "most drug couriers" was "clearly and plainly inadmissible." *Id.* at 548.

Here, the SANE's testimony about the correlation between domestic abuse and sexual assault is akin to the improper character evidence discussed in *Williams*. The SANE testified that "most often when it's someone who is a victim of ... domestic violence" there may "be an overlap of sexual assault as well." That testimony effectively profiled domestic abusers as perpetrators of sexual assault and invited the jury to infer

that, if McKinney fit the profile of a domestic abuser, he likely committed the sexual assault. Under *Williams*, such testimony constitutes improper character evidence.

However, the SANE's testimony about the "Power and Control Wheel" and the reoccurring cycle of abuse was not character evidence. Instead, it focused on the characteristics of abusive relationships and helped explain C.L.'s conduct to the jury. Specifically, the SANE's testimony about the "Power and Control Wheel" and the recurring cycle of abuse helped explain why C.L. continued in a relationship with McKinney despite his abuse, why she had consensual sex with McKinney the night before the sexual assault, and why she continued to communicate with McKinney after the sexual assault. Thus, the district court did not err by admitting the SANE's testimony about the "Power and Control Wheel" and the reoccurring cycle of abuse.

Prejudice

***7** Having concluded that the district court improperly admitted the SANE's testimony about the correlation between domestic abuse and sexual assault, we consider the issue of prejudice. McKinney argues that he is entitled to a new trial because there is a reasonable possibility that the SANE's "improper testimony substantially influenced the jury to convict." When an alleged error does not implicate a constitutional right, the defendant must prove "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011) (quotations omitted). In determining whether the erroneously admitted evidence significantly affected the verdict, we consider whether the district court gave a limiting instruction, whether the state dwelled on the evidence in the closing argument, and whether the evidence of guilt was overwhelming. *State v. Benton*, 858 N.W.2d 535, 541 (Minn. 2015).

Here, although the prosecutor referenced C.L.'s testimony in closing arguments, the evidence against McKinney was overwhelming. C.L. testified in detail regarding the events of May 5, including the alleged sexual assault. Moreover, testimony from several other witnesses, including C.L.'s mother, sister, and responding officers, showed that C.L.'s description of the offense never changed. Evidence was also admitted showing that McKinney repeatedly contacted C.L., asked her to lie about the events of May 5, and threatened her if she did not change her story. Additionally, in the recorded telephone conversations between McKinney and C.L., McKinney never denied raping her and repeatedly apologized for his actions. In fact, in one of the recorded phone calls, McKinney told C.L.: "I am asking you to straight flat out lie, let's be honest because *what I did was straight out rape.* What I did, abuse. What I did was disrespectful and so many other things." (Emphasis added.) And in another recorded phone conversation, McKinney repeatedly admitted to C.L. that he raped her. Thus, even though the district court erred by allowing some of the SANE's testimony, McKinney fails to establish that the wrongfully admitted evidence significantly affected the verdict. He therefore is not entitled to a new trial based on the district court's error.

III.

McKinney contends that the district court violated his constitutional right to present a complete defense by excluding evidence that C.L. falsely accused another individual, K.J., of sexual assault and sent messages to a different individual, J.E., stating her desire to engage in rough oral sex. McKinney argues that because this error was prejudicial, he is entitled to a new trial.

A criminal defendant has a constitutional right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). That right encompasses, among other things, "the right to present the defendant's version of the facts ... to the [fact-finder] so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967). But in presenting a defense, the defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). Evidentiary rulings will not be reversed absent a clear abuse of discretion. *Nunn*, 561 N.W.2d at 906-07.

K.J.'s Testimony

In a criminal-sexual-conduct trial, admission of evidence of a victim's prior sexual conduct is governed by Minnesota Rule of Evidence 412, commonly known as the rape-shield rule. Under this rule, "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order" under the rule's procedure. Minn. R. Evid. 412(1). Prior sexual conduct includes making prior allegations of sexual

abuse. *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

***8** A defendant's constitutional right to present a complete defense creates an exception to the rape-shield rule. *See State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). As this court explained in *Goldenstein*, evidence of a prior *false* accusation by an alleged victim of sexual abuse is admissible both to attack the credibility of the complainant and as substantive evidence tending to prove that the current offense did not occur. *Id.* Nonetheless, the admission of a prior false accusation is predicated upon the district court's threshold determination that "a reasonable probability of falsity exists." *Id.* The district court also must determine whether the probative value of the evidence of a victim's sexual conduct is substantially outweighed by its inflammatory or prejudicial nature in order to be admitted. Minn. R. Evid. 412(2)(C).

The district court allowed K.J. to testify that C.L. had a reputation for untruthfulness, but the court did not allow him to testify that C.L. had falsely accused him of rape. In doing so, the district court reasoned that McKinney failed to show a reasonable probability that C.L. had falsely accused K.J. of sexual assault. The district court explained that the proffered evidence presented a he-said-she-said situation because there was no evidence, other than K.J.'s assertion, that C.L. falsely accused K.J. of rape.

McKinney assigns error to that reasoning, arguing that the district court's use of a reasonable-probability-of-falsity standard was incorrect because in *State v. Caswell*, the supreme court only required a showing that the evidence "tend[ed] to establish" a predisposition to fabricate. 320 N.W.2d 417, 419 (Minn. 1982). However, in *Caswell*, the complainant admitted that she had falsely accused someone of sexual assault. *Id.* C.L. has not made such an admission here. Moreover, the district court's reasoning satisfied both standards: McKinney did not present evidence establishing a reasonable probability that C.L.'s sexual-assault accusation against K.J. was false or that C.L. was predisposed to fabricate such an accusation.

The district court also reasoned that the admission of the evidence would prolong the trial and confuse the jury. *See* Minn. R. Evid. 403 (stating that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). The district court explained that a "mini-trial" within the trial would be necessary to determine whether C.L. had falsely accused K.J. of sexual assault. Given the lack of evidence supporting K.J.'s assertion that C.L. had falsely accused him of sexual assault, the district court's reasoning is sound. In sum, McKinney does not persuade us that the district court abused its discretion by excluding evidence that C.L. falsely accused K.J. of sexual assault.

Text Messages to J.E.

McKinney also challenges the district court's exclusion of text messages C.L. sent to J.E., in which she described her desire to engage in fellatio with J.E. The district court allowed McKinney to question C.L. about "the nature of th[e] communications" with J.E., but the court excluded the substance of the messages. The district court based its exclusion on Minn. R. Evid. 412.

Generally, in a prosecution for criminal sexual conduct, "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." Minn. R. Evid. 412(1). But when the victim's consent is a defense, evidence of the victim's prior sexual conduct "tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue" may be admissible. *Id.*, (1)(A)(i).

***9** McKinney argues that rule 412 is inapplicable because he was not seeking to introduce evidence of C.L.'s "previous sexual conduct." He describes the proffered text messages as evidence of C.L.'s "desire to engage in a particular type of sexual conduct in the future." McKinney alternatively argues that if rule 412 applies, C.L.'s messages to J.E. fall within the rule's exception for evidence tending to establish a common scheme or plan. Specifically, McKinney argues that "C.L.'s messages ... tend to establish a 'plan' on her part to engage in the very type of sexual conduct she claimed she had not, would not, and did not willingly partake in with McKinney." McKinney further argues that "[t]he messages undermined C.L.'s credibility because they demonstrate she was being untruthful and misleading the jury about the nature of her and McKinney's sexual relationship and her interest in rough, submissive sex" and provided "substantive support for McKinney's claim that C.L. willingly engaged in rough sex with him."

We have reviewed the proffered text messages, and we are not persuaded that they describe the type of consensual "rough,

submissive sex" that McKinney described, and C.L. denied, at trial. Although the text messages are graphic, they do not express a willingness to engage in the type of sexual activity that McKinney attributed to C.L. Specifically, C.L.'s text messages did not indicate a desire to engage in hair pulling, biting, and choking. Thus, the messages were not relevant for impeachment, and they do not fall within rule 412's exception for evidence tending to establish a common scheme or plan. The district court therefore did not abuse its discretion by excluding the substance of the proffered text messages.

Moreover, even if the exclusion were error, McKinney would not be entitled to a new trial if the error was harmless beyond a reasonable doubt. *See State v. Johnson*, 915 N.W.2d 740, 745 (Minn. 2018) (stating that if an alleged error is constitutional in nature, the state must prove that the error was harmless beyond a reasonable doubt). "For an error to be harmless beyond a reasonable doubt, the State must show that the verdict was surely unattributable to the error." *Id.* (quotations omitted). A new trial is not required if an appellate court is "satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted).

The state argues that the exclusion was harmless beyond a reasonable doubt, based on the "very strong" evidence of guilt. We agree. Given the evidence that McKinney repeatedly contacted C.L. after the sexual assault and made several statements acknowledging guilt—including his statement that "I am asking you to straight flat out lie, let's be honest because what *I did was straight out rape*,"—we cannot say that the jury would have reached a different verdict if the damaging potential of the excluded evidence had been fully realized. (Emphasis added.)

IV.

McKinney contends that he is entitled to a new trial because the jury panel selected for his trial did not reflect a fair cross-section of the community. We review that claim de novo. *See State v. Griffin*, 846 N.W.2d 93, 99 (Minn. App. 2014), *review denied* (Minn. Aug. 5, 2014).

The United States and Minnesota Constitutions guarantee a criminal defendant the right to a jury pool that reflects a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S. Ct. 692, 697-98 (1975); *Williams*, 525 N.W.2d at 544. To make a prima facie showing that the jury venire did not reflect a fair cross-section of the community, a defendant must show "that the group allegedly excluded is a 'distinctive' group in the community, that the group in question was not fairly represented in the venire, and that the underrepresentation was the result of a 'systematic' exclusion of the group in question from the jury selection process." *Williams*, 525 N.W.2d at 542 (quoting *Duren v. Missouri*, 439 U.S. 357, 364-67, 99 S. Ct. 664, 668-70 (1979)).

***10** After the jury panel was identified, McKinney objected to the panel and requested a hearing to establish that "there is a systematic process within the State of Minnesota that works to not allow a proper representation of African-Americans on the jury pool." The district court granted McKinney's request for a hearing and, after that hearing, denied McKinney's challenge to the jury panel.

Here, only two people in McKinney's 40-person jury panel identified as Black, accounting for five percent of the pool. McKinney, who is Black, argues that this percentage fails to represent a fair cross-section of the community because a 2010 census shows that the overall percentage of eligible jurors in Ramsey County who are Black represent 9.34% of the county's population. But McKinney fails to establish a prima facie case for relief because *Williams* requires a showing that "over a significant period of time—panel after panel, month after month—the group of eligible jurors in question has been significantly underrepresented on the panels and that this results from ... unfair or inadequate selection procedures used by the state." *Id.* at 543 (describing this showing as "key").

Recently, the Minnesota Supreme Court noted that it had previously held, in *State v. Roan*, "that a jury selection system that 'use[d] registered voters, driver's licenses, and registered Minnesota identification card holders' did not systematically exclude people of color." *Andersen v. State*, 940 N.W.2d 172, 182 (Minn. 2020) (quoting *State v. Roan*, 532 N.W.2d 563, 569 (Minn. 1995)). The supreme court concluded that because the jury selection system used in *Roan* was the "same type of jury selection system" used in *Andersen*, the defendant's right to a fair trial was not violated. *Id.*; *see State v. Willis*, 559 N.W.2d 693, 700 (Minn. 1997) (concluding that "[e]ven if appellant were to show the necessary underrepresentation, as a matter of law, he could not demonstrate that the underrepresentation resulted from the state's procedures because in *Roan*, this court upheld the

same Hennepin County selection process at issue here against a Sixth Amendment challenge").

At the hearing on McKinney's challenge to the jury panel, the Ramsey County jury coordinator testified that the Ramsey County master jury list is comprised of records from the Department of Public Safety, which include driver's license records and state identification cards, as well as records from the Secretary of State, which include voter registration records. The Minnesota General Rules of Practice require that those sources be used when creating a master jury list for each county. *See* Minn. R. Gen. Prac. 806(b) (stating that "voter registration and drivers' license list[s] for the county must serve as the [venire] source list"). The supreme court has held that the use of those sources to select a venire panel does not systematically exclude people of color. *See Andersen*, 940 N.W.2d at 182. Thus, the Ramsey County jury selection procedure complied with Minnesota law and did not systematically exclude people of color.

McKinney also fails to establish that there was a significant underrepresentation of Black jurors in Ramsey County over a significant period of time. As the state points out, the county jury coordinator testified that he only had specific data available for the time period between October 2018, and October 2019, and that he could not "say for sure" whether the percentage of African Americans in the master jury list in any year met or exceeded their proportional representation in the community. Moreover, no evidence was presented showing the absence of alternative explanations for any underrepresentation, such as voluntary "no shows" or ineligibility for jury service. *See Griffin*, 846 N.W.2d at 101 (stating "[s]ystematic exclusion means that the underrepresentation is attributable to the juror-selection process and not alternative reasons such as individuals failing to show up for jury service"). In sum, McKinney fails to establish that he was denied his constitutional right to a jury pool that reflects a fair cross-section of the community.

***11 Affirmed.**

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Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,

v.

Jeffrey Charles BIRMAN, Respondent.

No. A11–2222.

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June 4, 2012.

St. Louis County District Court, File No. 69DU–CR–10–630.

Attorneys and Law Firms

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Considered and decided by JOHNSON, Chief Judge; CHUTICH, Judge; and CRIPPEN, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge. *

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

***1** Appealing from the district court's pretrial order, the State of Minnesota challenges the court's decision to admit evidence of the alleged victim's disclosures to her psychologist that she had been previously sexually abused by others when she was younger. Because respondent's offer of proof does not disclose the relevance of this evidence, and because the erroneous order admitting the evidence critically impacts the state's case, we reverse and remand for further proceedings.

FACTS

The state charged respondent Jeffrey Birman with criminal sexual conduct in the first, second, third, and fourth degree against S.L.R. in violation of Minn.Stat. §§ 609.342, subd. 1(c)(i), .343, subd. 1(e)(i), .344, subd. 1(c), .345, subd. 1(c) (2008). The complaint alleges that on April 23, 2009, respondent followed S.L.R. into a bathroom stall and forcefully engaged in sexual contact with her. The state's evidence includes S.L.R.'s testimony, her reports to others, and scientific evidence from a saliva sample that confirms respondent's alleged contact with S.L.R.

Before trial, the district court granted respondent's motion for an in camera review of S.L.R.'s psychological records. The state had disclosed that the current incident "brought up" past trauma for S.L.R., and respondent asserted that the records might reveal relevant evidence on S.L.R.'s emotional state. When examined, S.L.R .'s psychological records included statements that she made to her therapist about a series of incidents of her being the victim of sexual abuse at many stages of her life, including childhood and continuing until age 29. S.L.R. was 48 years old when respondent allegedly committed criminal sexual conduct against her and when she reported it; the earliest of the prior-abuse reports concerned an event before S.L.R. was age four.

Based on S.L.R.'s psychological records, respondent moved to admit 25 offers of proof pursuant to Minn.Stat. § 609.347 (2010) (rape-shield statute) and Minn. R. Evid. 412, arguing that they were "evidence of prior accusations of sexual assault" and "fit with [respondent's] theory of the case, that the encounter was consensual, and S.L.R. fabricated allegations and claimed rape." Respondent further noted that S.L.R.'s credibility was the central issue in the case. The district court on December 5, 2010, admitted 16 of the 25 offers of proof of "past allegations of sexual assault that pertain directly to past allegations of rape." The court based its decision on respondent's constitutional rights to due process, confrontation, and evidence presentation.

DECISION

The state may appeal a pretrial order arising from an alleged district court error if it can show that "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial," Minn. R.Crim. P. 28.04, subds.

1(1), 2; *see State v. Underdahl,* 767 N.W.2d 677, 682 (Minn.2009), including orders admitting evidence, *State v. Skapyak,* 702 N.W.2d 331, 335 (Minn.App.2005), *review denied* (Minn. Oct. 18, 2005). "Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction." *State v. Gradishar,* 765 N.W.2d 901, 902 (Minn.App.2009). Consequently, the state must show "clearly and unequivocally" first that "the district court's ruling will have a 'critical impact' on the State's ability to prosecute the case" and second that "the district court's ruling was erroneous." *State v. Zais,* 805 N.W.2d 32, 36 (Minn.2011) (quotation omitted).

1. Critical Impact

***2** Asserting critical impact of the district court's order, the state asserts that its case "rests almost entirely on S.L.R.'s testimony"; evidence of S.L.R.'s sexual abuse allegations would "demean S.L.R.'s credibility"; and the saliva sample that implicates respondent is insufficiently strong to "overcome the highly prejudicial impact" of the jury hearing about S.L.R.'s previous history of sexual abuse. This argument has merit.

The critical-impact test is "intended to be a demanding standard" and requires the state to show that the district court's ruling "significantly reduces the likelihood of a successful prosecution." *State v. Rambahal,* 751 N.W.2d 84, 89 (Minn.2008) (quotation omitted). The meaning and effect of the rape-shield statute, limiting the admissibility of a victim's sexual history, is that evidence of a victim's previous sexual conduct tends to demean the credibility of the victim's critical testimony and has a highly prejudicial impact on the jury. *See State v. Crims,* 540 N.W.2d 860, 868 (declaring, absent special circumstances, that prejudicial impact of victim's prior sexual history outweighs its probative value). The impact on the state of admitting such evidence is enlarged by the state's inability to appeal from a judgment of acquittal after a finding of not guilty. *See* Minn. R.Crim. P. 28.04 (providing limited prosecutorial right of appeal).

Respondent conceded in the district court that "this is a case with no other witness [other than S.L.R.], and comes down to a strict credibility determination." He argued both to the district court and to this court that the evidence of S.L.R.'s previous sexual abuse allegations is relevant to his defense theory that S.L.R. is a "serial accuser." As the language of respondent's theory implies and as he confirmed in argument to this court, he hopes to use the evidence to demean S.L.R.'s credibility by arguing that she fabricated her previous sexual abuse allegations. The evidence of respondent's saliva on S.L.R.'s body would at best have no effect on S.L.R.'s credibility and possibly further harm her credibility because respondent plans to argue that S.L.R. consented to their sexual encounter.

Respondent argues that S.L.R.'s credibility will not be demeaned if the jury believes that she has not fabricated her prior experiences and is a repeated victim, not promiscuous. This argument recites the possible failure of respondent's efforts to argue S.L.R.'s fabrications, but it does nothing to diminish his aim to severely damage S.L.R.'s credibility with the evidence. Respondent adds arguments on efforts the state could make to enhance S.L.R.'s credibility, but these arguments conflict with the record, including his concession that there are no other witnesses to the conduct of respondent that is the subject of her complaint.

In sum, the district court's admission of evidence of S.L.R.'s previous sexual abuse allegations, unless reversed, would have a critical impact on the trial's outcome. Consequently, this court has jurisdiction to hear this appeal under Minn. R.Crim. P. 28.04, subd. 2. *See Zais,* 805 N.W.2d at 36 (concluding that state satisfied critical-impact test where district court suppressed appellant's wife's testimony and appellant's wife was "the only eyewitness to [appellant's] conduct, and her testimony [bore] directly on whether the State [could] establish the elements of disorderly conduct").

2. District Court Ruling

***3** "Evidentiary rulings of the district court will not be overturned absent a clear abuse of discretion, even when constitutional rights are implicated." *State v. Pendleton,* 706 N.W.2d 500, 510 (Minn.2005).

The rape-shield statute and rule 412 render evidence of a victim's previous sexual abuse allegations inadmissible unless, among other requirements, "consent of the victim is a defense in the case," the evidence "tend[s] to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue," and "the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn.Stat. § 609.347, subd. 3(a)(i); Minn. R. Evid. 412(1)(A)(i); *see State v. Kobow,* 466 N.W.2d 747, 750 (Minn.App.1991) ("[T]he term

'sexual conduct" as used in Minn.Stat. § 609.347 includes 'allegations of sexual abuse.' "). [1]

1 The rape-shield statute, unlike rule 412, further provides that "[i]n order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated." Minn.Stat. § 609.347, subd. 3(a)(i).

In some circumstances, a defendant's constitutional rights to due process, confrontation, and evidence presentation may require the admission of evidence otherwise excluded by the rape-shield statute, *State v. Friend,* 493 N.W.2d 540, 545 (Minn.1992), or rule 412, *State v. Caswell,* 320 N.W.2d 417, 419 (Minn.1982). But, even if the evidence is otherwise admissible under the rape-shield statute, rule 412, or a defendant's constitutional rights, the "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403; *see State v. Benedict,* 397 N.W.2d 337, 341 (Minn.1986) (confirming that the court's prior declaration on the admissibility of evidence required by the defendant's due process rights does not diminish the trial court need "to balance the probative value of the evidence against its potential for causing unfair prejudice.").

Absence of Fabrication and Relevance

Despite his intent to assert fabrication of S.L.R.'s reports to her psychologist, respondent acknowledges that his offer includes no evidence that the reports were fabricated; he discloses in argument that he intends to explore the fabrication during trial and to claim fabrication in trial argument. [2] Because of respondent's acknowledged failure to offer evidence the reports were fabricated, the district court concluded that the evidence was not permitted by the rape-shield statute, and the court relied instead upon respondent's constitutional rights to due process, confrontation, and evidence presentation. [3] Relevant to respondent's constitutional rights, the district court observed that S.L.R.'s previous sexual abuse reports "are both highly probative of the alleged victim's credibility and critical to the jury's ability to assess that credibility." This is true, the district court observed, because respondent claims consent and claims that S.L.R. is a "serial accuser," not a serial victim.

2 Respondent has not disclosed his designs for lawful impeachment of S.L.R.'s reports at trial. Because the case comes to us on a pretrial order, we have no occasion to explore limits on respondent's impeachment rights.

3 The district court also correctly stated: "Notably, Minn. R. Evid. 412 does not contain the requirement that a judge must find the victim fabricated prior sexual assault allegations to find a common plan or scheme...." But the court does not claim the authority of rule 412 for admitting evidence of S.L.R.'s prior-abuse reports to her therapist; neither the district court nor respondent disclose relevance of the reports for any reason other than a showing of fabrication.

Respondent argues that rule 412 supports the district court's decision and argues that rule 412 prevails when in conflict with the rape-shield statute, relying on section 480.0591, subdivision 6. *See* Minn.Stat. § 480.0591, subd. 6 ("Present statutes relating to evidence shall be effective until modified or superseded by court rule. If a rule of evidence is promulgated which is in conflict with a statute, the statute shall thereafter be of no force and effect."). Respondent does not address the effect of subdivision 7 of the rape-shield statute (Minn.Stat.609.347, subd. 7), which declares that section 609.347 supersedes "Rule 412 of the Rules of Evidence"; *cf. State v. Gianakos,* 644 N.W.2d 409, 416 n. 10 (Minn.2002) ("While we acknowledge that the legislature has taken steps to limit the power of the court with respect to certain evidentiary issues, including privileges (*see, e.g.,* Minn.Stat. § 480.0591, subd. 6(a) (2000); Minn. R. Evid. 501), it is clear that the judicial branch has ultimate and final authority in such matters ."). Because neither the district court nor respondent contends that S.L.R.'s prior-abuse reports have any relevance other than as a showing of fabrication, and the district court acted on respondent's constitutional rights independent of statute, we have no occasion to further examine or resolve the suggested conflict between the statute and the rule.

***4** Central to the district court's analysis of the issue is its acknowledgment, despite its observation on the relevance of the prior-abuse evidence, that respondent's offer of proof

contained "[in]sufficient information to evaluate" if the prior sexual assault reports to a therapist were "fabricated." Respondent confirms this acknowledgment. The state argues that, because of the absence of evidence that S.L.R. fabricated her previous sexual abuse allegations, the evidence is insufficiently probative to overcome the danger that it would unfairly prejudice S.L.R.'s credibility. This argument has merit.

"[T]he rape shield statute serves to emphasize the general irrelevance of a victim's sexual history." *Crims,* 540 N.W.2d at 867. As the district court observed, sexual history evidence is admissible under the rape-shield statute only to show fabrication. Similarly, this court has previously stated that a determination of relevance of prior accusations of sexual misconduct depends on evidence that the accusations might have been fabricated. *State v. Goldenstein,* 505 N.W.2d 332, 340 (Minn.App.1993), *review denied* (Minn. Oct. 19, 1993); *see State v. Gerring,* 378 N.W.2d 94, 96–97 (Minn.App.1985) (affirming district court's refusal to admit evidence that victim made "prior accusations of rape" because it was irrelevant to her character for truthfulness because it "did not prove that [she] had made a prior *false* accusation of rape" (emphasis added)).[4] Enlarging the importance of this precedent, respondent concedes in his argument to this court that S.L.R.'s previous incident reports have no relevance other than to show a pattern of fabrication. Respondent's offer of proof is deficient as a matter of law. There is no showing that the offered evidence is probative sufficient to overcome its highly prejudicial nature.

4 This determination diminishes the importance of the fact, previously observed, that rule 412, contrasts with the rape-shield statute by excluding the express requirement that other-incident evidence show evidence of fabrication. Critically, both the statute and the rule require a showing that the evidence is probative. As once again is evident in this case, other-incident evidence that does not show fabrication may not be otherwise probative.

Perhaps explaining the district court's contrary conclusion, the court declares in its order admitting proof offered by respondent that S.L.R's allegations to her therapist "themselves do establish a pattern of clearly similar behavior, be that victimization or accusation, which will ultimately be a determination for the jury." Respondent similarly suggests that the sheer number of prior reports constitutes evidence of fabrication. But this conclusion rests on speculation as to the explanation for S.L.R.'s reported history, which also permits speculation on other explanations. Leaving this determination to the jury, as to each incident offered in evidence, suggests the need to speculate on the reliability of each report. Moreover, the danger of determining the relevance of each incident, even if additional evidence is produced, prompted the Eighth Circuit Federal Court to observe the risk of "trigger[ing] mini-trials concerning allegations unrelated to [a defendant's] case, and thus increas[ing] the danger of jury confusion and speculation." *Tail,* 459 F.3d at 861. "Before evidence of prior false accusations is admissible ... the trial court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *Goldenstein,* 505 N.W.2d at 340.

***5** The district court clearly abused its discretion by admitting evidence of S.L.R.'s previous sexual abuse allegations because the district court found insufficient evidence that she fabricated her allegations.

Absence of Clearly Similar Behavior Pattern

The state argues that S.L.R.'s previous sexual abuse allegations are insufficiently similar to her conduct in this case because they do not constitute a "signature." This argument also has merit, further reducing the relevance of the prior allegations.

"[E]vidence of sexual activity with third persons cannot withstand a rule 403 weighing unless special circumstances enhance its probative value," such as "situations in which the evidence explains a physical fact in issue at trial, suggests bias or ulterior motive, or establishes a pattern of behavior *clearly* similar to the conduct at issue." *See Crims,* 540 N.W.2d at 868 (emphasis in original). Proof of a *clearly* similar behavior pattern to the conduct at issue requires "evidence of modus operandi," which includes "only those activities so unusual, so outside the norm, and so distinctive as to constitute a signature." *Id.* (quotation omitted). The insights noted in rule 403 cases enlarge our holding that respondent's offer of proof does not show the relevance of the proffered items of evidence. And in terms of the rape-shield statute and rule 412, there must be a showing of a common scheme or plan of similar sexual conduct under circumstances similar to current accusations.

The district court admitted the following 16 offers of proof from respondent's 25 offers of proof because they "pertain directly to past allegations of rape." S.L.R. stated that she was

"raped frequently between the ages of four and 29"; "her first memory is of being raped at age 4"; a neighbor "molested" her when she was four; someone's dad "molested her when she had hitchhiked at 12 years old"; a "supervisor ... raped her when she was 15"; a person "raped her after hitchhiking" when she was 15 or 16; a person "raped her when she was 17"; "she finds it very difficult to walk past [a certain] jewelry store" because "the owner of that store ... raped her on her 18th birthday"; "a pizza delivery male ... raped her when he gave her a ride home"; "she feared that [a man who walked her home] would rape her sister and instead she experienced it herself"; S.L.R. "believes that she has had chronic sexual abuse from boyfriends and significant others as well as her husband." The offers of proof also included S.L.R. stating that "a group of neighborhood boys hauled [S.L.R.] into a tree house" and assaulted her when she was four; a neighbor "pinned her against [a] garage" and "tried to kiss her"; and that she was "assaulted multiple times in cars." The offers of proof also included S.L.R.'s retelling of the sexual encounter in this case, that respondent "attacked" her and "raped [her] in the bathroom of a billiard hall."

***6** No doubt, the evidence appears to show a remarkable set of experiences, but neither respondent nor the district court have pointed to any evidence that the allegations are "so distinctive as to constitute a signature." It is important to observe, initially, that S.L.R.'s criminal-sexual-conduct allegation against respondent is materially different from her previous allegations because her allegation against respondent is the only one that she made to the police; the remainder she only made to her therapist.

The probative value of the evidence of S.L.R.'s previous sexual abuse allegations is further diminished by the fact that she alleges that respondent committed criminal sexual assault against her when she was 48, and she reported it to the police when she was 48, almost 20 years after the last sexual-abuse incident that she alleged to her therapist. And three of the incidents—the tree house assault, the garage kissing, and the car assaults—do not "pertain directly to past allegations of rape," which the district court stated as part of its rationale for admitting incident reports.

The district court clearly abused its discretion by admitting the evidence of S.L.R.'s previous sexual-abuse allegations, both because it was not generally probative and because its probative value was further reduced by the absence of evidence of a pattern of behavior clearly similar to the victim's accusation in this case. We reverse and remand for further proceedings. [5]

5 The district court asserted that much of the evidence regarding S.L.R.'s previous sexual-abuse allegations is "the type of evidence as that which was admitted in *Carroll.*" But this analysis misstates the significance of *Carroll.* In that case, we held that, based upon appellant's due process and confrontation rights, the district court erred by "deny[ing] appellant the right to cross-examine a witness whose inconsistent statements had been admitted as evidence and shown to the jury," noting that "a court must allow attorneys to comment on and use *admitted evidence.*" *State v. Carroll,* 639 N.W.2d 623, 629 (Minn.App.2002) (emphasis in original). In this case, the district court had not yet admitted the evidence of S.L.R.'s previous sexual-abuse allegations before doing so in the order from which the state appeals.

Reversed and remanded.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Donald Deundre HARRIS, Jr., Appellant

A17–0192

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Hennepin County District Court, File No. 27–CR–14–33747

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Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

WORKE, Judge

***1** Appellant argues that he is entitled to a new trial because: (1) the district court abused its discretion by admitting *Spreigl* evidence; (2) the district court abused its discretion by excluding evidence that the victim had previously engaged in prostitution; and (3) the state failed to disclose evidence, which constituted *Brady* and discovery violations. We affirm.

FACTS

In January 2003, T.S. invited two people to her apartment to celebrate her birthday. Her guests invited another person to join them. That individual introduced himself as "Q." At some point, Q went into T.S.'s bedroom and asked T.S. to join him, saying that he wanted to talk privately. Q either pushed or pulled T.S. onto the bed and started kissing her. T.S. asked Q to leave, at which point he pinned her down and covered her mouth. Q penetrated T.S.'s vagina with his penis, ejaculated, walked out of her bedroom, and soon thereafter left her apartment. T.S. called 911. Police transported her to the hospital, where a sexual-assault nurse collected vaginal and perineal swabs for DNA. T.S.'s case went dormant after completion of the initial investigation.

In October 2008, K.H. met a man who identified himself as "Don." K.H. invited Don to her home that evening along with three of her friends. After K.H.'s friends left her home around midnight, Don sat next to K.H. on a couch, put his arm around her, and started kissing her. K.H. told Don that she was not comfortable doing anything other than kissing, at which point Don grabbed her hair and put his hand around her throat. Don put a hand down K.H.'s pants, then attempted to force oral sex on her. K.H. resisted, and Don pushed her down on the couch, removed her pants, and penetrated her vagina with his penis. Don eventually got up, went to the bathroom, and left. K.H. went to the hospital, where a nurse took swabs for DNA that were used to develop a DNA profile for K.H.'s attacker.

In 2010, a forensic analyst tested T.S.'s vaginal swab and found the presence of semen. A predominant DNA profile was obtained from the swab, but without a known suspect, the investigation of T.S.'s assault went cold.

In 2014, appellant Donald Deundre Harris, Jr. emerged as a suspect in T.S.'s case. A DNA sample was collected from Harris, which matched the sample taken from T.S. Police interviewed Harris and he admitted using the nickname "Don Q."

Harris was charged with third-degree criminal sexual conduct. The state moved to admit *Spreigl* evidence of the 2008 sexual assault. The district court granted the motion for the purpose of demonstrating a common scheme or plan. The state called four witnesses to testify about the 2008 incident, including K.H., the nurse who collected DNA samples, and two forensic analysts.

The day after T.S. testified, the prosecutor spoke with the victim-witness advocate about T.S.'s testimony. The advocate informed the prosecutor about a prior conversation with T.S. about "the DNA." The advocate recounted that T.S. did not want to discuss it, but T.S. told the advocate that her boyfriend was "making her do things she didn't want to do while he was in jail." The advocate believed that T.S. was referring to forced prostitution.

***2** Upon learning of the conversation between T.S. and the advocate, the prosecutor notified defense counsel of T.S.'s statement and the advocate's impression. Harris moved for a mistrial or, in the alternative, a continuance to investigate T.S.'s statement. The district court denied these motions. Harris then moved to admit evidence of T.S.'s prior sexual conduct pursuant to Minn. R. Evid. 412. The district court denied Harris's motion. The jury found Harris guilty and the district court sentenced him to 68 months in prison. This appeal followed.

DECISION

Spreigl evidence

Harris argues that the district court abused its discretion by admitting evidence of the 2008 sexual assault. Evidentiary rulings rest within the discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, Harris bears the burden of establishing that the district court abused its discretion and that he was prejudiced. *See id.* Prejudice exists when "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (quotation omitted).

Generally, evidence of other crimes or misconduct is inadmissible to prove a defendant's character to show that he acted in conformity with that character. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But this evidence may be admissible for the "limited purpose of showing motive, intent, absence of mistake or accident, identity, or a common scheme or plan." *Id.* (citing Minn. R. Evid. 404(b)). The supreme court has developed a five-step process for determining whether to admit this evidence:

> (1) [T]he state must give notice of its intent to admit the evidence;
>
> (2) the state must clearly indicate what the evidence will be offered to prove;
>
> (3) there must be clear and convincing evidence that the defendant participated in the prior act;
>
> (4) the evidence must be relevant and material to the state's case; and
>
> (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685–86 (Minn. 2006). If the admission of this evidence is a close call, it should be excluded. *Id.* at 685.

Harris concedes that the state provided notice of its intent to admit *Spreigl* evidence, but argues that the state failed to meet the other requirements. First, Harris argues that the state failed to clearly indicate what the *Spreigl* evidence was offered to prove. "Implicit in the requirement that the proponent of *Spreigl* evidence disclose its purpose is that there also be some showing or determination that the evidence reasonably and genuinely fits that purpose." *State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005). It is insufficient to merely recite a purpose listed in rule 404(b) "without also demonstrating at least an arguable legitimacy of that purpose." *Id.*

The state sought the admission of that evidence "to prove intent, motive, identity, absence of mistake or accident, and/or common scheme or plan." The state filed a 13–page memorandum detailing how the *Spreigl* evidence was offered for each purpose. The state satisfied the second element of the *Spreigl* analysis.

Second, Harris argues that the state failed to prove his participation in the incident by clear and convincing evidence. "[A] defendant's participation in a *Spreigl* incident may be considered clear and convincing when it is highly probable that the facts sought to be admitted are truthful." *Ness*, 707 N.W.2d at 686. The testimony of the victim of a *Spreigl* offense may, by itself, be sufficient to prove the offense by clear and convincing evidence. *Kennedy*, 585 N.W.2d at 389.

***3** Harris argues that the district court abused its discretion by relying on the state's written offer of proof to satisfy this step of the *Spreigl* analysis. However, the supreme court has rejected this argument and permitted district courts to rely on an offer of proof in the form of a memorandum. *See id.* at

390 (stating that there was "no merit" to the argument that the state failed to satisfy the clear-and-convincing standard because the district court permitted the state to submit its offer of proof in a memorandum).

Here, the state asserted that Harris introduced himself to the 2008 victim as "Don Q[,]" waited until she was alone, placed his hands around her neck, pulled off her clothes, attempted to force oral sex, and penetrated her vagina with his penis. At trial, the 2008 victim's testimony was consistent with this version of events. Furthermore, she positively identified Harris in a photographic lineup and Harris's DNA matched the DNA profile of her assailant. The state proved Harris's participation by clear-and-convincing evidence.

Harris also argues that the district court mistakenly ruled that the *Spreigl* offense was material and relevant, first, because the *Spreigl* offense was not markedly similar in time, and second, because the *Spreigl* offense and the charged offense were not sufficiently similar to justify admission to demonstrate a common scheme or plan. "*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or substantially similar to the charged offense—determined by time, place and modus operandi." *Id.* at 391. The common-scheme-or-plan exception covers only conduct with a marked similarity in modus operandi to the charged offense. *Ness*, 707 N.W.2d at 689. The supreme court has declined to adopt a bright-line rule to determine whether a prior bad act has lost its relevance on the basis of remoteness. *Id.* at 688 (citing *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005)).

Here, the *Spreigl* offense occurred five years after the charged offense. Harris argues that "five years is too distant to satisfy the substantial similarity standard." But the supreme court has upheld the admission of *Spreigl* evidence significantly more remote than five years. *See Washington*, 693 N.W.2d at 202–03 (affirming admission of 16–year-old *Spreigl* evidence); *see also State v. Wermerskirchen*, 497 N.W.2d 235, 237, 243 (Minn. 1993) (affirming admission of 19–year-old *Spreigl* evidence).

Furthermore, the district court found that the charged offense and the *Spreigl* offense bore numerous similarities. In particular: (1) Harris met each victim the day of the incident; (2) Harris initiated physical contact with each victim and his advances were rejected; (3) Harris isolated each victim; (4) once alone with each victim, Harris made sexual advances; (5) Harris used force to incapacitate each victim, applying that force to the face or neck; (6) Harris forcibly removed each victim's pants; (7) Harris vaginally penetrated each victim with his penis; and (8) Harris left each victim's residence shortly following the sexual assault. These similarities equal or exceed the similarities in other cases in which the supreme court has affirmed the admission of *Spreigl* evidence to demonstrate a common scheme or plan. *See State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (concluding that the charged offense and *Spreigl* offense were markedly similar because both involved the defendant punching an individual's head, a verbal disagreement preceding other acts, a disagreement of minor significance, the defendant claiming self-defense, and the defendant showing no visible signs of injury from the altercations). The record supports the district court's conclusion that the charged offense and *Spreigl* offense were markedly similar.

***4** Finally, Harris argues that the probative value of the *Spreigl* evidence was outweighed by its risk of unfair prejudice. Even if *Spreigl* evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. The closer the relationship in time, place, and modus operandi between the *Spreigl* offense and the current charge, the less likely the jury will use the evidence improperly. *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004). When balancing the probative value of *Spreigl* evidence against its potential for unfair prejudice, a district court considers the state's need for the evidence. *Ness*, 707 N.W.2d at 690. The supreme court has explained necessity as follows:

> "Need" for other-crime evidence is not necessarily the absence of sufficient other evidence to convict, nor does exclusion necessarily follow from the conclusion that the case is sufficient to go to the jury. A case may be sufficient to go to the jury and yet the evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue.

State v. Bolte, 530 N.W.2d 191, 197 n.2 (Minn. 1995).

Here, the *Spreigl* evidence had high probative value because it corroborated T.S.'s account of the sexual assault. Furthermore, as the district court noted, Harris indicated an intent to raise a consent defense, and the *Spreigl* evidence supported the state's position that Harris had a common scheme or plan to commit a sexual assault.

Harris asserts that the *Spreigl* evidence was unfairly prejudicial because presentation of that evidence consumed an undue amount of time, and confused and misled the jury. Unfair prejudice in the *Spreigl* context refers to "the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *Montgomery*, 707 N.W.2d at 399 (quotation omitted). The reading of cautionary instructions lessens the probability of undue weight being given by the jury to the *Spreigl* evidence. *See State v. Slowinski*, 450 N.W.2d 107, 114–15 (Minn. 1990).

Here, the state presented four witnesses to testify about the *Spreigl* incident, but this testimony was not redundant, and "the state had the right to present evidence of the details of the [*Spreigl* incident]." *Ture v. State*, 681 N.W.2d 9, 16 (Minn. 2004). The district court also gave the jury cautionary instructions before the state introduced the *Spreigl* evidence and during its final instructions, and then referred the jury to its cautionary instruction in response to a jury question concerning the relevance of the *Spreigl* evidence. The probative value of the *Spreigl* evidence was not outweighed by its risk of unfair prejudice and the district court correctly admitted evidence of the 2008 incident.

Rule 412 evidence

Harris argues that the district court abused its discretion by denying his motions to admit evidence of T.S.'s involvement in prostitution and to grant a hearing to assess the evidence before ruling on its admissibility.

Generally, in a prosecution for criminal sexual conduct, "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." Minn. R. Evid. 412(1). When the victim's consent is a defense, evidence of the victim's prior sexual conduct "tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue" may be admissible. *Id.* (1)(A)(i). Rule 412 lays out the procedure to introduce evidence of prior sexual conduct. *Id.* (2). The accused must make a motion setting out with particularity an offer of proof of the evidence the accused seeks to admit. *Id.* (2)(A). If the district court deems that offer of proof sufficient, the court shall conduct a hearing outside the presence of the jury allowing the accused to make a full presentation of the offer of proof. *Id.* (2)(B).

***5** "To qualify as a pattern of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects." *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996), *review denied* (Minn. May 21, 1996). Conduct involving an agreement to trade sex for money bears no clear similarity to conduct involving the exchange of sex for drugs. *Id.* at 35.

The district court's conclusion that evidence of T.S.'s involvement in prostitution was "remote and uninstructive" is supported by the record. In his offer of proof, Harris stated that T.S. told a victim-witness advocate that, at the time of the offense, her boyfriend required her to do things that she would not have otherwise done. Harris also offered that the state spoke to T.S. again and disclosed to the defense that her boyfriend "did prostitute her but 8 months after he got out of jail. Not before and not during [the] sexual assault. For money not drugs and not for her—he got [the] money. Only happened a few times and she stopped it." Harris offered no specific evidence indicating that the prostitution actually occurred prior to or contemporaneously with the charged offense. Furthermore, even assuming that T.S.'s statements about the timing of the prostitution were not truthful, Harris's offer of proof contained no evidence suggesting that the sexual conduct involved trading sex for drugs. Instead, Harris's offer of proof suggested that T.S. traded sex for money, not drugs. Minnesota caselaw holds that trading sex for drugs is not sufficiently similar to trading sex for money such that this evidence would demonstrate a pattern of clearly similar behavior. *See id.*, 546 N.W.2d at 35 (stating that an agreement to trade sex for money bears no clear similarity to exchanging sex for drugs). We hold that the district court correctly excluded evidence of T.S.'s involvement in prostitution.

Harris also argues that he was entitled to a hearing pursuant to rule 412(2)(D). If new information is discovered after the date of the rule 412(2)(B) hearing or during trial that makes evidence of prior sexual conduct admissible, the accused may make an offer of proof and the district court shall hold an in camera hearing to determine whether the proposed evidence is admissible. Minn. R. Evid. 412(2)(D).

The district court concluded that Harris was not entitled to an in camera hearing because it had just held a hearing pursuant to rule 412(2)(B) and there was no additional information

the district court could gain from holding another hearing. This conclusion is consistent with rule 412. Harris offered no evidence after the rule 412(2)(B) hearing that would make T.S.'s involvement in prostitution admissible. We hold that the district court correctly determined that Harris was not entitled to an additional hearing.

Brady/Discovery violations

Harris argues that he is entitled to a new trial because the state's late disclosure of T.S.'s statement and the victim-witness advocate's impression that she was referring to forced prostitution constituted both a *Brady* violation and a discovery violation.

Brady violations present mixed questions of law and fact, which this court reviews de novo. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005). Determining whether a discovery violation took place is an issue of law, which this court reviews de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). However, this court reviews the district court's decision whether to impose sanctions for discovery violations for an abuse of discretion. *Id.* This court also reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003).

Brady violation

***6** In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97 (1963). "Thus, in criminal cases, the state has an affirmative duty to disclose evidence that is favorable and material to the defense." *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). Whether the individual prosecutor knows of evidence favorable to the defense is not dispositive for *Brady* purposes. *Id.* at 235. Rather, the prosecutor must disclose exculpatory information in the possession or control of the prosecution staff and anyone else who has participated in the investigation and who regularly reports to the prosecutor's office. *Id.*

A *Brady* violation is composed of three elements. *Pederson*, 692 N.W.2d at 459. First, the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching. *Id.* Second, the evidence must have been willfully or inadvertently suppressed by the state. *Id.* Finally, the accused must have been prejudiced as a result. *Id.* All three elements must be met to constitute a *Brady* violation. *Id.* A defendant is not entitled to a new trial unless the evidence is "material," meaning that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 460 (quotation omitted). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* (quotation omitted).

As stated previously, evidence relating to T.S.'s engagement in prostitution was not admissible. Because Harris could not have introduced this evidence even if it had been disclosed earlier, this evidence was not material. Consequently, Harris was not prejudiced by the late disclosure of this evidence, and this late disclosure does not constitute a *Brady* violation. The district court did not err when it denied Harris's motion for a mistrial on that basis.

Discovery violation

At the defense's request and before the rule 11 omnibus hearing, the prosecutor must allow access to "all matters within the prosecutor's possession or control that relate to the case, except as provided in Rule 9.01, subd. 3." Minn. R. Crim. P. 9.01, subd. 1. The prosecutor must also make certain disclosures, including "the substance of oral statements" that are known to the prosecutor and relate to the case. *Id.*, subd. 1(2)(c). Prosecutors also have a continuing duty to disclose information learned in interviews with potential witnesses. *State v. Moore*, 493 N.W.2d 606, 608 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993).

In determining whether to impose sanctions for a discovery violation, the district court considers "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Failure to consider these factors constitutes an abuse of discretion. *State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). Nonetheless, a conviction will stand if the error was harmless beyond a reasonable doubt. *Id.* "An error is harmless if the jury's verdict is surely unattributable to the error." *Id.* (quotation omitted).

Because the prosecutor has a duty to disclose "the substance of oral statements" that relate to the case, the prosecutor should have disclosed, at an earlier time, T.S.'s statement to the victim-witness advocate. *See* Minn. R. Crim. P. 9.01,

subd. 1(2)(c). The district court denied Harris's request for a continuance after the state's disclosure but failed to make specific findings concerning the *Lindsey* factors, which constitutes an abuse of discretion. *See Sailee*, 792 N.W.2d at 95.

***7** Nonetheless, this error was harmless and does not warrant a new trial. First, as the district court stated, the discovery violation was likely inadvertent. Second, and most importantly, Harris was not prejudiced because any discussion of T.S.'s engagement in prostitution was inadmissible. Therefore, the state's failure to timely disclose these statements did not affect the jury's verdict. Because the district court's failure to discuss the *Lindsey* factors was harmless, Harris is not entitled to a new trial.

Affirmed.

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