IN THE
SUPREME COURT OF THE UNITED STATES
No. ___ - _____

EMEM UFOT UDOH,

Petitioner,

vs.

UNITED STATES DISTRICT COURT, *District of Minnesota,*

Respondent.

APPENDIX

Dated: March 8, 2021

Respectfully Submitted,

Emem U. Udoh, 245042
Pro se Litigant,
7600 525TH Street
Rush City, MN 55069

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2952

In re: Emem Ufot Udoh

Petitioner

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-04174-PAM)

JUDGMENT

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

Petition for writ of mandamus has been considered by the court and is denied. Petitioner's motion for leave to proceed on appeal in forma pauperis is denied as moot. Mandate shall issue forthwith.

October 01, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2952

In re: Emem Ufot Udoh

Petitioner

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-04174-PAM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 13, 2020

Order Entered At the Direction of the Court
Clerk, U.S. Court of Appeals, Eighth Circuit

Filed in Fourth Judicial District Court
6/15/2018 2:04 PM
Hennepin County, MN

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
State of Minnesota, Respondent, v. Emem Ufot Udoh, Petitioner.	Case Type: Criminal Judge Tamara Garcia Court File No. 27-CR-13-8979 **ORDER DENYING POST-CONVICTOIN PETITION IN PART AND GRANTING AN EVIDENTIARY HEARING IN PART**

The above-entitled matter came before the Honorable Tamara Garcia on April 10, 2018 on Petitioner's petition for post-conviction relief.

PARTIES

Christina Warren, Assistant Hennepin County Attorney, is the attorney of record for the State of Minnesota.

Emem Udoh, Petitioner, is pro se.

Upon the evidence adduced, the arguments of counsel, and all files, records and proceedings herein, the Court makes the following:

PROCEDURAL POSTURE AND FINDGS OF FACT

1. Petitioner was charged with (1) Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, subd. 1(b), (2) Criminal Sexual Conduct in the Second Degree in violation of Minn. Stat. § 609.343, subd. 1(b), (3) Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, subd. 1(a), and (4) Criminal Sexual Conduct in the Second Degree in violation of Minn. Stat. § 609.343, subd. 1(a). Counts 1 and 2 related to the sexual abuse of Petitioner's stepdaughter, K.K.W. Counts 3 and 4 related to the sexual abuse of Petitioner's stepdaughter, K.C.W.

2. A full recitation of the facts presented at trial can be found in *State v. Udoh*, which the Court adopts and incorporates here. 2016 WL 687328, *1-2 (Minn. 2016).

3. On August 19, 2014, following trial, a jury found Petitioner guilty of Counts 1, 2 and 4, but acquitted him on Count 3. On September 25, 2014, Petitioner was convicted on Counts 1, 2 and 4 and sentenced on Counts 1 and 4.

4. On direct appeal, Petitioner's appellate counsel raised two issues: (1) "that the district court abused its discretion by allowing expert testimony on the ultimate issue" and (2) that the district court "erred by entering a conviction on a count of second-degree criminal sexual conduct." *Id.* at *1.

5. The first issue dealt with the district court allowing Dr. Thompson to testify as to whether or not a person would have to penetrate the female genital opening in order to touch a female on her hymen. *Id.* at *2-3. The Court of Appeals ultimately held that the District Court did not abuse its discretion in overruling Petitioner's objection and allowing Dr. Thompson's testimony on that point and that there was "little likelihood that the challenged testimony substantially influenced the jury's decision." *Id.* at *3-4 (internal quotations omitted).

6. On the second issue raised by appellate counsel, the Court of Appeals agreed that Petitioner was incorrectly convicted of Count 2, as it was a lesser-included offense to Count 1.

7. Petitioner also raised four issues pro se on appeal: "that (1) the district court abused its discretion by limiting cross-examination of K.K.W.; (2) the district court erred by admitting certain evidence; (3) the prosecutor committed misconduct; and (4) the district court erred by denying his motion for a judgment of acquittal." *Id.* at *4. The Court of Appeals denied all of Petitioner's pro se grounds for relief.

8. The Court of Appeals issued its opinion on this matter on February 22, 2016 and remanded to the district court for vacation of Petitioner's conviction on Count 2. Immediately upon receipt of the appellate court opinion and also on February 22, 2016, the undersigned issued an order vacating Petitioner's conviction on Count 2 and ordering a new warrant of commitment be issued. On May 31, 2016, the Minnesota Supreme Court declined review of this matter and affirmed the appellate court decision.

9. On April 10, 2018, Petitioner filed a petition for post-conviction relief requesting relief on the following 10 grounds[1]:

   a. that the District Court abused its discretion in excluding evidence of specific instances of conduct showing untruthfulness on the part of K.K.W.;
   b. that the District Court erred in admitting the CornerHouse videos into evidence;
   c. prosecutorial misconduct;
   d. that the District Court erred in denying Petitioner's motion for judgment of acquittal on the grounds of insufficient evidence;
   e. that the District Court erred in convicting Petitioner of Count 2;
   f. that the District Court erred in allowing Dr. Thompson to testify about what constituted penetration in this matter;
   g. that Petitioner received ineffective assistance of trial counsel for failing to properly preserve issues a-f;

[1] The Court refers to these grounds as claims a-j throughout the remainder of this order.

h. that Petitioner received ineffective assistance of appellate counsel for failing to "adequately and effectively" raise issues a-g;
i. that Petitioner is entitled to an acquittal or a new trial based on newly recanted witness testimony[2]; and
j. that *Knaffla*,[3] which acts as a procedural bar to Petitioner's claims in a-g, is unconstitutional.

Petitioner seeks relief in the form of discovery, subpoenas for identified witnesses, an evidentiary hearing, vacation of his convictions and a new trial.

10. Petitioner's claims a-f are virtually identical to claims raised by Petitioner and his counsel on direct appeal. Additionally, Petitioner's claim that *Knaffla* is unconstitutional is not truly a ground for relief, but rather an argument for why claims a-g should not be procedurally barred, thus, it will be treated as argument applicable to all claims a-g rather than a separate claim for relief.

11. In his petition, Petitioner includes the following exhibit to support his claim that the victims have recanted their trial testimony:

A7: Notarized Affidavits of K.K.W. and K.C.W.

Both affidavits are dated March 17, 2018 and notarized on March 18, 2018. K.K.W.'s affidavit states that she lied about Petitioner abusing her following the suggestion of her friend in order to get her phone back. She also indicates she was pressured to maintain the story under threats by unspecified persons who told her that her brothers would be taken away, that her mom would go to jail and she would be in trouble if she did not do as they said. She states that she is sorry and wants her family back because she misses her mother, her brother and her stepdad. K.C.W.'s affidavit states that she lied about Petitioner abusing her because she was scared of the police, social worker, and all of the other people with whom she spoke. K.C.W. also expressed that she stuck with her story due to threats that her mother would go to prison and that she would get in trouble if she changed her story.

CONCLUSIONS OF LAW

Discovery

1. Chapter 590 provides a vehicle for relief when appellate review is no longer available. *State v. Vikeras*, 378 N.W.2d 1, 3 (Minn. Ct. App. 1985). "These procedures were not devised to permit parties to engage in legal games or to permit a petitioner to embark upon unlimited and undefined discovery proceedings." *Thompson v. State*, 170 N.W.2d 101, 104 (Minn. 1969). "A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Therefore, "preconviction trial rights,"

[2] Petitioner describes this as "newly discovered evidence."
[3] *State v. Knaffla*, 309 N.W.2d 246 (Minn. 1976).

including rights under the pre-trial discovery rules and *Brady v. Maryland*, 373 U.S. 83 (1963), do not extend to postconviction proceedings. *Id.* In the postconviction proceeding, discovery is closed and will not be reopened absent good cause. *Carter v. State*, 2001 WL 682790 at *3 (Minn. Ct. App. June 19, 2001).

2. Petitioner has failed to identify any specific items of discovery he is requesting and has made no showing of good cause that the Court should reopen discovery in this matter. Thus, Petitioner is not entitled to discovery at this point in the proceedings.

Claims a-f: Errors during the Trial Court Proceedings

3. "The court...may summarily deny a petition when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case." Minn. Stat. § 590.04, subd. 3. Moreover, while a person convicted of a crime is entitled to review, claims that have been fully and fairly litigated, should not be re-litigated on subsequent appeals or petitions. *State v. Knaffla*, 243 N.W.2d 737,741 (Minn. 1976).

4. Petitioner argues that *Knaffla* should not be applied as a bar to his claims as the decision is unconstitutional. *Knaffla* has been a part of Minnesota jurisprudence for over 40 years and has been relied upon repeatedly by both the Minnesota Court of Appeals and the Minnesota Supreme Court throughout that time. The Supreme Court has cited it as recently as June 6, 2018. *See Wayne v. State*, – N.W.2d –, 2018 WL 2708743 (Minn. 2018). The Court is not persuaded by any of Petitioner's arguments that *Knaffla* is unconstitutional either generally or as applied to his case.

5. There are two exceptions to the *Knaffla* rule; (1) "the claim is so novel that its legal basis was not reasonably available at the time of the direct appeal" or (2) "when fairness so requires and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal". *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004). Neither exception applies to any of Petitioner's claims.

6. While Petitioner cites *Tome v. United States*, for the proposition that the admission of prior consistent statements of witnesses should not have been admissible (claim b), and argues that it is a "novel" legal claim not available to him during appeal, the *Tome* decision is not an exception to the *Knaffla* bar for two reasons. 513 U.S. 150 (1995). First, *Tome* dealt with the federal rules of evidence and is therefore not binding in a state court, unless adopted by the individual state. Minnesota has not adopted the reasoning in *Tome*. Second, *Tome* was decided in 1995, 20 years before Petitioner's appeal. Thus, it was equally available to him at the time of his appeal and is, therefore, not a "novel" legal claim.

7. In this case, a number of Petitioner's claims have already been decided by the Minnesota Court of Appeals. Specifically, Petitioner's claims a-d were raised by Petitioner pro se and claims e-f were raised by appellate counsel. With the exception of the request to vacate Petitioner's conviction on Count 2 (claim e), the Minnesota Court of Appeals denied all of Petitioner's claims. Petitioner has offered no reason sufficient to show that

fairness requires that this Court revisit claims already decided by the Court of Appeals. Because these claims were already fully and fairly litigated before the Court of Appeals,[4] Petitioner may not re-litigate these claims now. Therefore, claims a-d and f are summarily denied.

8. Petitioner is correct that he was erroneously convicted of both Count 1 and Count 2, where Count 2 was a lesser-included charge of Count 1. However, pursuant to the Court of Appeals opinion, this Court vacated Petitioner's conviction on Count 2 on February 22, 2016. The court record of Petitioner's convictions on this matter accurately reflects this vacation and Petitioner no longer stands convicted of Count 2. Petitioner has already received the appropriate remedy for this error and, therefore, his request to vacate the conviction of Count 2 is moot.

Claim g: Ineffective Assistance of Trial Counsel.

9. "[T]he *Knaffla* rule also bars any claims not made but about which a petitioner knew or should have known at the time of an earlier appeal or petition." *Walen v. State*, 777 N.W.2d 213, 25 (Minn. 2010) (citing *Knaffla* at 741). As discussed above, *Knaffla* is not unconstitutional, and therefore applies in this matter.

10. Petitioner's claims relating to ineffective assistance relate to alleged errors counsel made leading up to and during Petitioner's trial. Petitioner knew or should have known about all of these issues at the time of his direct appeal. Petitioner himself did not raise ineffective assistance of trial counsel at his appeal, despite raising four other claims pro se. Petitioner has failed to assert any reason that his failure to raise the claim was anything but deliberate and inexcusable. *See supra State v. Greer*. Nothing has changed about trial counsel's performance or Petitioner's ability to know about trial counsel's performance since Petitioner's appeal. Thus, Petitioner is procedurally barred from now raising an ineffective assistance of trial counsel claim.

11. Even if this Court were to consider Petitioner's ineffective assistance of counsel claim on its merits, Petitioner would still not prevail. When an ineffective assistance of counsel claim is raised, courts analyze the claim under the test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, Petitioner must first show that counsel's representation fell below an objective standard of reasonableness, and second, that there was a reasonable probability that but for counsel's errors, the result would have been different. *Id.* "A defendant is provided with effective representation if his attorney 'exercise[s] the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances.'" *State v. Heinkel*, 322 N.W.2d 322, 326 (Minn. 1982). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986); *see also State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (noting that "counsel's performance is presumed to be reasonable"). A reviewing court

[4] The Court notes that Petitioner has also tried to unsuccessfully litigate portions of claim b in federal court. *See* Petitioner's Exhibit A8.

need not address both elements of the *Strickland* test if one is dispositive. *Hawes v. State*, 826 N.W.2d 775, 783 (Minn. 2013).

12. Petitioner cannot meet either prong with regard to trial counsel. The Minnesota Supreme Court has generally held that reviewing courts should not review ineffective assistance of counsel claims that are based on trial strategy. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009); *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). What evidence to present to the jury, what witnesses to call, and whether to object are all considered part of trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence. *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001); *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). This position is grounded in the public policy of allowing counsel to "have the flexibility to represent a client to the fullest extent possible." *Jones*, 392 N.W.2d at 236.

13. Determining which witnesses to call at trial and who to reasonably investigate before trial falls squarely within the trial strategy discretion of counsel. Thus, Petitioner cannot show ineffective assistance of counsel to the extent that his claim of ineffective assistance of counsel relies on trial counsel's failure to investigate or subpoena certain witnesses.

14. Petitioner's other arguments of ineffective assistance of trial counsel likewise fail. First, even though Petitioner argues that he received ineffective assistance of trial counsel because trial counsel failed to preserve a number of his other claims, Petitioner's own citation of the record undermines this assertion. In support of the majority of his other claims, Petitioner actually cites to portions of the transcript where his counsel either objected to the evidence Petitioner claims was error to admit, or made the requests on Petitioner's behalf he is now claiming it was error to deny. Thus, Petitioner has not demonstrated that trial counsel's performance fell below the standard of reasonableness.

15. Additionally, because the Court of Appeals did not deny any of Petitioner's claims on the basis that they were not properly preserved by a failure to object, Petitioner cannot show that but for any deficiencies on the part of trial counsel his outcome on appeal would have been different. Rather, the Court of Appeals considered each of Petitioner's claims on its merits and found each to be meritless. Thus, after considering the entire record, including the appellate court opinion, the Court concludes that Petitioner's claim of ineffective assistance of trial counsel is wholly without merit.[5]

Claim h: Ineffective Assistance of Appellate Counsel

16. As with Petitioner's ineffective assistance of trial counsel claim, in order to demonstrate he received ineffective assistance of appellate counsel, he must meet the *Strickland* test. Petitioner must first show that counsel's representation fell below an objective standard of reasonableness, and second, that there was a reasonable probability that but for

[5] The Court acknowledges that based upon the Court of Appeals' reversal on the issue of Petitioner's conviction on Count 2, trial counsel may have been ineffective in not objecting to that conviction. However, since the issue of Petitioner's erroneous conviction has already been remedied, there is no reason to believe counsel's ineffectiveness on that issue continues to impact Petitioner.

counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, "appellate counsel [does] not have a duty to include all possible claims on direct appeal, but rather [is] permitted to argue only the most meritorious claims." *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007).

17. Petitioner's claims of ineffective assistance of appellate counsel center on appellate counsel's failure to effectively raise claims a-g on appeal. First appellate counsel did raise claims e and f on appeal, and won a reversal on claim e. Petitioner has not demonstrated that appellate counsel failed to raise appropriate arguments with regard to claim f. Rather, the appellate court considered claim f fully on its merits and determined that the trial court did not commit error in allowing Dr. Thompson's testimony.

18. With regard to claims a-d, while it is true that appellate counsel did not raise these claims on appeal, Petitioner did and they were fully considered on their merits by the Court of Appeals. Petitioner has failed to demonstrate that the outcome of his appeal on these issues would have been any different had they been raised by counsel instead of pro se. Moreover, the Court of Appeals found claims a-d to be meritless and thus, appellate counsel was not required to raise them. Instead, appellate counsel exercised professional judgment in determining that claims e-f were the most meritorious claims to raise on appeal. Because Petitioner has failed to demonstrate that appellate counsel's performance was ineffective under *Strickland*, he is not entitled to any relief on this ground.

Evidentiary Hearing on Claims a-h

19. Since the petition, files and records of the proceedings in this matter conclusively show that Petitioner is not entitled to relief on claims a-h, he is not entitled to an evidentiary hearing on those claims. Minn. Stat. 590.04, subd. 1. Neither is he entitled to have witnesses on those claims subpoenaed.

Claim i: Victim Recantations

1. The Court evaluates a request for a new trial on the basis of recanted trial testimony using the three-prong "*Larrison* test"; that "(1) the court is reasonably well satisfied that the testimony given by a material witness was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise when the false testimony was given and was unable to meet it or did not know that the testimony was false until after trial." *State v. Caldwell*, 835 N.W.2d 766, 772 (Minn. 2014). The first two prongs are compulsory, however, the third prong, while relevant is not an "absolute condition precedent." *Id.* Petitioner "does not need to satisfy the *Larrison* standard at this stage of the proceeding. Rather, to determine whether [Petitioner] is entitled to an evidentiary hearing, [the Court] assumes the truth of his allegations that bear sufficient indicia of trustworthiness and determine[s] whether those allegations would be legally sufficient to entitle him to relief if they were proven at a hearing." *Id.*

2. The recantations come in form of notarized affidavits signed by the victims themselves, thus they bear sufficient indicia of trustworthiness for the Court to consider them. Assuming then, as it must, that the allegations laid out in Petitioner's claim and as supported by the affidavits are true, the Court is persuaded that but for the victims' alleged false testimony, the jury might have reached a different conclusion. While it is true, as the State points out in its brief, that both victims were impeached with their character for untruthfulness and that the motives for fabrication were presented in part at trial, the fact that the recanting witnesses are the victims is significant. The State did produce other evidence of Petitioner's abuse of the victims at trial, however, all of that evidence was ultimately based on the statements of the two victims. The Court is not convinced that if these two witnesses had testified at trial consistent with the affidavits attached to Petitioner's petition or were to do so at a new trial, the jury would reach the same conclusion. Thus, in order for the Court to fully analyze Petitioner's claims under the *Larrison* test, an evidentiary hearing, including testimony subject to cross examination from K.K.W. and K.C.W. is necessary so the Court may adequately assess the genuineness of the recantations and from there determine the falsity of the trial testimony.

IT IS HEREBY ORDERED

1. Petitioner's request for discovery is DENIED.

2. Petitioner's requests for post-conviction relief on the basis of errors during the trial process (claims a-d and f) are summarily DENIED in their entirety.

3. Petitioner's request for the vacation of his conviction on Count 2 (claim e) is DENIED as moot.

4. Petitioner's request for post-conviction relief on the basis of ineffective assistance of trial counsel (claim g) is DENIED in its entirety.

5. Petitioner's request for post-conviction relief on the basis of ineffective assistance of appellate counsel (claim h) is DENIED in its entirety.

6. Petitioner's request for subpoenas of Charles E. Johnson, Donothan Bartley, Ann Norton, Daniel E. Johnson, Catrina Blair, Molly Lynch, Kelvin Pregler, Joanne Wallen, Karen Wegerson, Ann Mock, Patricia Harmon, Bill Koncar, Grace W. Ray, Linda Thompson, Christa Groshek, Kelly Moore, Davi E. Axelson, and any other person related to claims a-h is DENIED.

7. Petitioner's request for an evidentiary hearing on his motion for a new trial based upon recanting witness testimony is GRANTED.

8. Counsel for the State of Minnesota shall contact the Court regarding her availability for an evidentiary hearing upon receipt of this order.

9. Once an evidentiary hearing has been scheduled, a writ shall be obtained to ensure Petitioner's presence at the hearing.

10. Parties shall subpoena or otherwise secure the presence of any witness they believe is necessary on the issue of the victims' recantation. Witnesses will not be allowed to testify as to any other issue at the evidentiary hearing.

BY THE COURT:

Dated: 6.15.18

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Tamara Garcia
Judge of District Court
Fourth Judicial District

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Emem Ufot Udoh,

Petitioner,

v.

Becky Dooley, Warden,

Respondent.

Case No. 16cv4174 (PAM/HB)

MEMORANDUM AND ORDER

This matter is before the Court on a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. For the following reasons, the Petition is denied.

BACKGROUND

On August 19, 2014, a Hennepin County jury convicted Petitioner Emem Ufot Udoh of two counts of second-degree criminal sexual conduct and one count of first-degree criminal sexual conduct. The charges arose out of contact Udoh had with his two stepdaughters, 13-year-old K.K.W. and 11-year-old K.C.W. The trial court sentenced Udoh to 144 months' imprisonment on the first-degree conviction, and a concurrent 70 months on the second-degree convictions. Udoh appealed, filing both an attorney-authored brief and a pro se brief. The Minnesota Court of Appeals determined that the second-degree count as to K.K.W. was a lesser included offense of the first-degree count as to the same child, and vacated that conviction, but otherwise rejected Udoh's challenges. State v. Udoh, No. A14-2181, 2016 WL 6867328 (Minn. Ct. App. 2016). On remand, the trial court sentenced Udoh to the same sentence it had previously imposed.

After the Minnesota Supreme Court denied review and the United States Supreme Court declined to issue a writ of certiorari, Udoh brought the instant Petition, claiming that his conviction runs afoul of the United States Constitution. Although his precise claims are difficult to decipher, the Petition can fairly be read to raise six grounds for relief. Ground One argues that an expert witness interfered with the jury's role by testifying that Udoh's conduct qualified as penetration. Ground Two claims that his convictions for both first- and second-degree criminal sexual contact as to K.K.W. violated his Double Jeopardy rights and caused the trial court to impose an unconstitutionally cumulative punishment, including lifetime supervised release. Ground Three contends that the trial court violated Udoh's Confrontation Clause rights by not allowing him to present extrinsic evidence that allegedly would have undermined the credibility of one of the victims. Ground Four claims that the trial court's determination regarding extrinsic evidence of the victim's veracity violated Udoh's due-process rights and his right to a fair trial. Ground Five argues that prosecutorial misconduct deprived Udoh of his due-process and equal-protection rights. And Ground Six contends that the trial court erred in denying Udoh's motion for a judgment of acquittal because there was insufficient evidence to convict him.[1] Udoh asks for an evidentiary hearing on his claims.

[1] Udoh's reply memorandum raises a new argument, that the prosecutor's use of the videos of the victims' interviews at CornerHouse, and those interviews themselves, as well as physical examinations of the victims, constituted unreasonable seizures under the Fourth Amendment. (Pet'r's Reply Mem. (Docket No. 18) at 23-25.) As a result, Udoh claims that he was unable to present a complete defense. (Id. at 24.) But the interviews and exams were not seizures as to Udoh; the only rights implicated in the interviews and

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DISCUSSION

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 et seq., a federal court "undertake[s] only a limited and deferential review of underlying state court decisions." Collier v. Norris, 485 F.3d 415, 421 (8th Cir. 2007). Indeed, AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002) (citation omitted). 28 U.S.C. § 2254 provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Further, § 2254 states that "a determination of a factual issue made by a State court shall be presumed to be correct." Id. § 2254(e)(1). The burden is on the petitioner to "rebut[] the presumption of correctness by clear and convincing evidence." Id.

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exams were the rights of the victims themselves. Udoh has no standing to object to that alleged violation of rights. And even if the claim had any legal merit, Udoh did not raise it in his Petition, nor did he present it to the state courts. He is therefore procedurally barred from pressing the claim here.

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Udoh asks that this Court review the state-court rulings de novo, arguing that the state courts failed to adjudicate the merits of Udoh's federal constitutional claims. But Udoh misapprehends the governing legal standards. Although a claim not adjudicated on the merits in state court is not entitled to deferential review, Brown v. Luebbers, 371 F.3d 458, 460-61 (8th Cir. 2004), the "pertinent question is not whether the [state court] explicitly discussed the [federal constitutional issues] but whether its decision contradicted applicable Supreme Court precedent in its reasoning or result." Cox v. Burger, 398 F.3d 1025, 1030 (8th Cir. 2005). A state court's "reasonable application of established federal law 'does not require citation of [Supreme Court] cases—indeed, it does not even require awareness of [these] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.'" Id. (quoting Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (emphasis in original)). Even a cursory review of the trial court's and appellate court's decisions on the issues Udoh raises reveal that those courts either considered federal constitutional principles in evaluating Udoh's claims or that their determinations are not contrary to Supreme Court precedent, to the extent the claims implicate any federal constitutional rights. Thus, the claims he raises here were "adjudicated on the merits in State court" and the decisions of those courts is entitled to § 2254's highly deferential review.

Under that deferential review, "[a] federal court may not issue the writ simply because it 'concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.'" Lyons v. Luebbers, 403 F.3d 585, 592 (8th Cir.

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2005) (quoting Williams v. Taylor, 529 U.S. 362, 411 (2000)). A "state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011).

B. Expansion of the Record and Evidentiary Hearing

Udoh has attached several documents to his Petition that were not part of the record before the state courts. He asks the Court to consider those documents by expanding the record under Rule 7 of the Rules Governing Habeas Corpus Cases under Section 2254. But "[w]hen a petitioner seeks to introduce evidence pursuant to this rule, the conditions prescribed by § 2254(e)(2) must still be met." Mark v. Ault, 498 F.3d 775, 788 (8th Cir. 2007). Under § 2254(e)(2), "[a] habeas petitioner must develop the factual basis of his claim in the state court proceedings rather than in a federal evidentiary hearing unless he shows that his claim relies upon a new, retroactive law, or due diligence could not have previously discovered the facts." Cox, 398 F.3d at 1030 (citing 28 U.S.C. § 2254(e)(2)). The documents in Udoh's exhibits D-F and H are documents that Udoh could have previously discovered. Indeed, these are documents that pre-date Udoh's trial, and include documents that he and his attorney likely possessed before trial. They are not newly discovered evidence. Rule 7 does not apply, and the Court will not consider documents that were not part of the state-court record.

Nor is Udoh entitled to an evidentiary hearing on his claims. AEDPA provides that a habeas petitioner is entitled to a hearing only if he can show that his claim "relies on a new rule of constitutional law . . . or a factual predicate that could not have been

previously discovered through the exercise of due diligence" and that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the [petitioner] guilty . . . ." Id. § 2254(e)(2). As discussed, there is no newly discovered evidence here, nor is there a new rule of constitutional law that applies to Udoh's claims. His request for an evidentiary hearing is denied.

C. Merits

1. Usurping the Jury's Role

During trial, the prosecutor elicited testimony from a physician who examined the victims that the conduct they described amounted to "penetration." Penetration is an element of first-degree criminal sexual conduct under Minnesota law. See Minn. Stat. § 609.342, subd. 1 (defining crime in relevant part as engaging in "sexual penetration"). Udoh contends that this testimony deprived him of a fair trial because the issue of whether there was penetration was for the jury to determine. Udoh's appellate counsel raised this issue on appeal, arguing that the trial court disregarded state law and state evidentiary rules in overruling Udoh's objection to this testimony. The Minnesota Court of Appeals determined that state precedent and rules of evidence did not prohibit an expert witness from testifying regarding penetration in this instance. The appeals court also determined that the testimony likely did not influence the jury's decision because "the record contained unobjected-to evidence of penetration." Udoh, 2016 WL 687328, at *4.

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Udoh does not explain the federal constitutional basis for this claim. He cites no federal case holding that expert testimony regarding a matter for the jury's determination violates any federal constitutional principle or is contrary to clearly established Supreme Court precedent. Udoh's reply memorandum seems to indicate that he believes the state court's fact-finding was deficient as to this claim. But Udoh has not established that the state courts' factual determinations were unreasonable in light of the evidence presented at trial. This claim is without merit.

2. Double Jeopardy and Cumulative Punishment

Udoh argues that his conviction for the second-degree lesser included offense as to K.K.W. violated double jeopardy and caused the trial court to impose cumulative punishment, including a lifetime of supervised release. Of course, any double jeopardy issue was resolved by the appellate court's reversal of Udoh's second-degree conviction as to K.K.W., and the Court will not discuss this aspect of Udoh's claim further.

Udoh contends that the imposition of punishment as to the lesser included offense violates Supreme Court precedent. He did not raise any constitutional issue regarding his sentencing in his appeal, and thus this claim is likely procedurally barred. See Joubert v. Hopkins, 75 F.3d 1232, 1240 (8th Cir. 1996) (explaining procedural bar for claims not properly raised in state courts). But even if not barred, it is without merit. Although multiple punishments for the same offense violate Double Jeopardy, Brown v. Ohio, 432 U.S. 161, 165-66 (1977), Udoh was not subjected to multiple punishments for the same offense. Rather, he was sentenced to 144 months on the first-degree conviction as to K.K.W., and a 70-month concurrent sentence on the second-degree conviction as to

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K.C.W. The trial court's decision that he should be on supervised release for the remainder of his life is not additional punishment. See, e.g., United States v. Watts, 519 U.S. 148, 154 (1997) (finding that sentence enhancements are not additional punishments for the same offense but rather only increase a sentence "because of the manner in which [the defendant] committed the crime of conviction"). Nor is the imposition of supervised release for life an impermissible collateral consequence of the vacated second-degree conviction. Rather, Minnesota law provides that defendants convicted of first-degree criminal sexual conduct under Minn. Stat. § 609.342 must be placed on supervised release "for the remainder of the offender's life." Minn. Stat. § 609.3455, subd. 7(b). The imposition of lifetime supervised release was thus mandatory and not an unconstitutional collateral consequence of the vacated second-degree conviction.

Minnesota's determination that certain sex offenders such as Udoh should be subject to lifetime supervision is not an additional or cumulative punishment under the Double Jeopardy Clause, and this portion of the Petition fails.

3. Impeachment of Child Victim

Two of the Petition's grounds arise from the trial court's determination that Udoh's counsel could not present extrinsic evidence of K.K.W.'s alleged propensity for lying or telling untrue stories. Udoh claims in Ground Three that this determination violated his Confrontation Clause rights and in Ground Four that it deprived him of his due-process rights and his right to a fair trial.

At trial, Udoh sought to offer the testimony of the victims' mother, a school social worker, and a police detective regarding K.K.W.'s past false statements and accusations.

The trial court denied the request, finding that this evidence was extrinsic evidence of a witness's propensity for truthfulness and was thus barred under the Minnesota Rules of Evidence. See Minn. R. Evid. 608(b) ("Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness, . . . may not be proved by extrinsic evidence.") The court of appeals recognized that evidentiary rules must be interpreted in light of the Sixth Amendment's Confrontation Clause, "which guarantees a defendant the opportunity to cross-examine the witnesses against him." Udoh, 2016 WL 687328, at *4. The court found that the evidence regarding K.K.W.'s prior instances of lying and telling "crazy stories" were not so closely related to K.K.W's allegations against Udoh to render their exclusion a violation of Udoh's right to present a complete defense or a violation of his right to confront witnesses against him. Id. at *5. As the court noted, Udoh cross-examined K.K.W. and she admitted to prior instances of lying. Thus, the jury heard evidence that K.K.W. was not always truthful, and the exclusion of testimony from other witnesses regarding specific instances of untruthfulness was within the trial court's discretion and was not a violation of Udoh's constitutional rights.

The Confrontation Clause gives a criminal defendant the right to cross-examine witnesses against him, "and, through cross examination, to expose the motivation of witnesses in testifying." United States v. Drapeau, 414 F.3d 869, 975 (8th Cir. 2005) (citing Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986)). But this right "is not without limits, even where the subject matter is bias." Id. "The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and

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expose [] infirmities through cross-examination. Delaware v. Fensterer, 474 U.S. 15, 22 (1985). "[T]he ability to cross-examine the witness through other means is a factor in considering whether the [trial] court violated confrontation rights." United States v. Sigillito, 759 F.3d 913, 938 (8th Cir. 2014). Indeed, the Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes." Nevada v. Jackson, 133 S. Ct. 1990, 1994 (2013) (emphasis in original).

Udoh cross-examined K.K.W., and was permitted to ask her mother about her reputation for truthfulness. Any other evidence in this regard would have been cumulative and likely would have confused the jury. Id. at 1993-94. The state courts correctly analyzed Udoh's claims in this regard and determined that the exclusion of extrinsic evidence regarding K.K.W.'s propensity for truthfulness was not improper under the Confrontation Clause.

Similarly, the state appellate court did not err in determining that the exclusion of this evidence was not a violation of Udoh's right to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (quotation omitted). There is no clearly established Supreme Court precedent that the exclusion on state evidentiary grounds of a sexual abuse victim's prior false claims of assault violates the Constitution. Jackson, 133 S. Ct. at 1991. Thus, under § 2254, the state courts' resolution of this issue was not unreasonable. This claim is denied.

4. Prosecutorial Misconduct

Udoh contends that the "cumulative effect" of prosecutorial misconduct resulted in a violation of his right to a fair trial. He does not cite specific examples of misconduct, leaving the Court to guess at what comments or conduct were allegedly improper.[2] In his pro se brief to the Minnesota Court of Appeals, Udoh argued that the prosecutor's use of the word "victim" to describe K.K.W. and K.C.W. in opening statements and closing arguments was improper, and that the prosecutor committed misconduct in questioning witnesses by asking leading questions and making suggestive comments. To the extent he seeks to raise any other instances of misconduct here, those claims are procedurally barred.

Under both Minnesota and federal law, prosecutorial misconduct will warrant a new trial only if it could reasonably have affected the verdict, United States v. Eldridge, 984 F.2d 943, 946 (8th Cir. 1993), or put another way, if it "impaired the defendant's right to a fair trial." Udoh, 2016 WL 687328 at *7 (quoting State v. Powers, 654 N.W.2d 667, 678 (Minn. 2003)). And prosecutorial misconduct rises to the level of a Constitutional violation, correctable on habeas, only if that misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

[2] Udoh argues in his reply memorandum that his prosecutorial misconduct claim is supported by a USA Today investigation from 2010 that found that prosecutors throughout the United States "repeatedly" committed misconduct, and by a 2010 treatise opining that courts have not been effective at curbing prosecutorial misconduct. (Pet'r's Reply Mem. at 15-16.) General claims of nationwide prosecutorial misconduct that allegedly resulted in "hundreds of wrongful convictions" (id. at 16) are not proof that the prosecutor in Udoh's trial committed any misconduct.

The court of appeals determined that Udoh had not established misconduct, "let alone serious misconduct," and that, even if any of the conduct amounted to prosecutorial misconduct, the conduct did not influence the jury's decision to convict "because the other evidence of Udoh's guilt was strong. Udoh, 2016 WL 687328, at *7, 9. This determination is not an unreasonable application of federal law, nor is it an unreasonable determination of the facts in light of the evidence presented at the trial. Udoh is not entitled to relief on this claim.

5. **Judgment of Acquittal**

Finally, Udoh contends that the trial court erred in failing to grant his motion for judgment of acquittal because there was insufficient evidence to convict him. He argues that the denial of his motion deprived him of due process, because the accused has the right to be found not guilty unless each element of the crime is proved beyond a reasonable doubt. (Pet. (Docket No. 1) at 5.)

The Court of Appeals rejected Udoh's pro se appeal on this claim, finding that the evidence was sufficient to submit the case to the jury. Udoh, 2106 WL 687328, at *9. Udoh has not presented any meritorious legal or factual argument that would lead this Court to conclude otherwise. This claim is denied.

D. Certificate of Appealability

Udoh may not appeal this Court's decision without a Certificate of Appealability. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1). But a Certificate of Appealability is available only if a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by

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demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Udoh's claims are without merit and reasonable jurists could not determine otherwise. He is therefore not entitled to a certificate of appealability.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED that:**

1. The Petition for a Writ of Habeas Corpus (Docket No. 1) is **DENIED**; and

2. No certificate of appealability will issue.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 5, 2017

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

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STATE OF MINNESOTA
IN COURT OF APPEALS
A14-2181

State of Minnesota,
Respondent,

vs.

Emem Ufot Udoh,
Appellant.

Filed February 22, 2016
Affirmed in part, reversed in part, and remanded
Minge, Judge*

Hennepin County District Court
File No. 27-CR-13-8979

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kirk, Judge; and Minge, Judge.

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

UNPUBLISHED OPINION

MINGE, Judge

On appeal from his criminal-sexual-conduct convictions, appellant Emem Udoh argues that the district court abused its discretion by allowing expert testimony on the ultimate issue and erred by entering a conviction on a count of second-degree criminal sexual conduct. He also raises several issues in a pro se supplemental brief. Because the district court did not abuse its discretion by allowing the expert testimony and the issues in Udoh's pro se supplemental brief do not identify any reversible error, we affirm with respect to all of those matters. But because one of the second-degree criminal-sexual-conduct convictions is a lesser-included offense of the first-degree criminal-sexual-conduct conviction, we reverse and remand for that conviction to be vacated.

FACTS

Udoh was charged with first-degree and second-degree criminal sexual conduct toward each of his stepdaughters, K.K.W. and K.C.W., ages 13 and 11 respectively at the time of trial. The K.K.W. counts alleged conduct that occurred between April 25, 2012 and February 19, 2013; the K.C.W. counts alleged conduct between June 20, 2012 and February 19, 2013. On February 19, 2013, a school social worker learned that K.K.W. spoke of being abused. K.K.W: told the social worker and the school liaison law enforcement officer that Udoh had touched both her and her younger sister, K.C.W., inappropriately.

Subsequently, K.K.W. told a Hennepin County child-protection worker that "there were several incidents where [Udoh] would . . . touch her . . . privates" and that she did not

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feel safe. K.C.W. told the worker that no abuse had occurred and that she felt safe at home. Both girls were removed from their home.

Both girls were interviewed at CornerHouse. K.K.W. variously reported that Udoh touched "outside" her "private" with his hand and with "his private," that Udoh touched inside her underwear, that his finger went inside her "private area," and that Udoh laid on top of her "jerking his private into mine," but clarified that she "meant the outside" of her private. K.C.W. initially told CornerHouse staff that nothing had happened to her, but then admitted that she was "lying before," that "[i]t did really happen," and that Udoh "opens this thing" with "[h]is fingers" and "checks to see if we're having sex."

Both K.K.W. and K.C.W. were also examined by Dr. Linda Thompson, a CornerHouse pediatrician. They told Dr. Thompson that they had been molested by Udoh. Using an anatomically correct doll, K.K.W. indicated that Udoh touched the "innermost part of the genital area." K.C.W. again stated that Udoh told her he was checking to see if the girls were having sex and, by pointing, indicated that he touched her inside the genital opening.

At trial, both girls testified to their ages when the incidents occurred, what Udoh did, that T.U., their mother (and Udoh's wife), was at work at the time of contact, and that they told their mother about the contacts. While varying on some details, their testimony was similar to what they told the CornerHouse interviewer and Dr. Thompson. K.K.W. stated that when Udoh moved his private parts and something wet came out, he told her not to tell her mother, and that when she told her mother anyway, her mother did not believe her. On cross-examination, K.K.W. agreed that she and Udoh argued a lot, that it was

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frustrating living with him, that he yelled at her about her grades and talking to boys, and that he gave her "whoopings." K.K.W. admitted that Udoh took her cell phone away right before she reported the abuse.

K.C.W. testified that Udoh used his hands to spread open her vagina and looked inside. K.C.W. thought that this "[p]robably" happened more than 15 times. K.C.W. "told him to stop a couple times, but he didn't." K.C.W. testified that she initially lied about not being abused because Udoh and her mom "told [her] not to tell or [she] would be in foster care and then we won't never see each other again." K.C.W. said that she told the truth at CornerHouse because the lies were confusing and she "got tired of it."

T.U. testified that K.K.W. had a reputation at home for lying and that K.C.W. was "a little sneaky," meaning that she too had been dishonest. T.U. also denied that the girls ever told her about any inappropriate touching. According to T.U., K.K.W. admitted to making up the allegations because she was mad that Udoh took her phone away. Udoh denied having sexual contact with his stepdaughters and testified that K.K.W. had a reputation at home for dishonesty.

The jury found Udoh guilty of both first-degree and second-degree criminal sexual conduct toward K.K.W. and of second-degree criminal sexual conduct toward K.C.W. The jury found Udoh not guilty of first-degree criminal sexual conduct toward K.C.W. The district court entered convictions on the three guilty verdicts and sentenced Udoh to 144 months in prison on the first-degree conviction related to K.K.W. and to a concurrent sentence of 70 months on the second-degree conviction related to K.C.W. The district

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court did not impose a sentence on the second-degree conviction of Udoh with respect to K.K.W. This appeal followed.

DECISION

I.

The first issue is whether the district court abused its discretion in permitting Dr. Thompson, a medical doctor, to answer a question of whether Udoh's contact with K.K.W. was penetration. The district court has broad discretion regarding the admissibility of evidence, including expert testimony. *State v. Reese*, 692 N.W.2d 736, 740 (Minn. 2005). We review the district court's admission of expert testimony for an abuse of discretion. *State v. Goldenstein*, 505 N.W.2d 332, 341 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). When challenging an evidentiary ruling, the appellant must show both that the district court abused its discretion and that the appellant "was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

An expert may testify "in the form of an opinion or otherwise" if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. An expert may even provide "opinion testimony on ultimate issues if such testimony is helpful to the factfinder." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005). "[I]f the subject of the testimony is within the knowledge or experience of a lay jury and the expert would not be able to deepen the jury's understanding, then the testimony does not meet the helpfulness requirement and is not admissible." *Reese*, 692 N.W.2d at 740.

On direct, the prosecutor asked Dr. Thompson several questions about female anatomy and where K.K.W. indicated she had been touched. Dr. Thompson described a

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diagram of female genitalia to the jury. She was then asked, based on the reported touching, the following questions:

> [PROSECUTOR]: In order to—for somebody to touch a female on their hymen, would they have to penetrate [the entrance to the genital opening]?
> [DEFENSE ATTORNEY]: Objection. Calls for a legal conclusion.
> THE COURT: Overruled. You may answer, doctor.
> ....
> [DR. THOMPSON]: In order to touch the hymen, these two sides have to have been separated; and so something has gone in there into the whole opening in order to get to the hymen.
> [PROSECUTOR]: Okay. So when we talk about something being inside of the genitals, the female genitals, there's more than one version of what inside might be. Is that fair to say?
> [DR. THOMPSON]: Yes.

Udoh challenges the above testimony, arguing that it "impermissibly interfered with the jury's determination of whether Udoh penetrated [K.K.W.'s] genitals." To convict Udoh of first-degree criminal sexual conduct toward K.K.W., the jury had to determine that he "engage[d] in sexual penetration with another person." *See* Minn. Stat. § 609.342, subd. 1 (2012) (requiring only "sexual contact" if the victim was under 13 years of age). Udoh argues that, because the prosecutor used the term "penetration" in her question, Dr. Thompson's answer "embraced 'legal conclusions or terms of art.'" *See Moore*, 699 N.W.2d at 740 ("Under the helpfulness test, this court has not allowed ultimate conclusion testimony which embraces legal conclusions or terms of art." (quotation omitted)). But our caselaw does not hold testimony to be erroneous simply for including the word "penetration." *See State v. Kroshus*, 447 N.W.2d 203, 205 (Minn. App. 1989) (stating that there was medical testimony that the victim had experienced vaginal penetration), *review*

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denied (Minn. Dec. 20, 1989); *State v. Perez*, 404 N.W.2d 834, 837 (Minn. App. 1987) (noting a doctor's testimony that the victim "exhibited vaginal injury consistent with penetration"), *review denied* (Minn. May 20, 1987).

Udoh argues that the challenged testimony was similar to the improper expert testimony in *Moore*. In *Moore*, a doctor testified that the victim's injuries met the definition of great bodily harm. 699 N.W.2d at 739. The supreme court determined that because the doctor's testimony basically told the jury what result it must reach, it was not helpful to the jury. *Id.* at 740. The testimony was also not helpful because "[w]hether [the victim's] injuries constituted 'great bodily harm' was a question within the knowledge and experience of the jury." *Id.*

Moore is distinguishable because without further explanation from Dr. Thompson regarding female anatomy and correct medical terms, a lay jury likely lacked the knowledge and experience to determine whether Udoh "engage[d] in sexual penetration" by touching and viewing K.K.W.'s hymen. *See* Minn. Stat. § 609.342, subd. 1; *see also* Minn. Stat. § 609.341, subd. 12(2) (2012) (defining sexual penetration as being "any intrusion however slight into the genital or anal openings"). Dr. Thompson was not telling the jury what result it must reach. *See Moore*, 699 N.W.2d at 740. The testimony helped the jury determine whether Udoh intruded into K.K.W.'s genital opening and therefore "engage[d] in sexual penetration." *See* Minn. Stat. § 609.341, subd. 12; Minn. Stat. § 609.342, subd. 1. Because we conclude that Dr. Thompson's testimony was helpful to the jury, it follows that the district court did not abuse its discretion by overruling Udoh's objection and allowing the doctor to answer.

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We also note that there is little likelihood that the challenged testimony "substantially influenced the jury's decision." *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (quotation omitted). The record contained unobjected-to evidence of penetration: The prosecution had played the recording of Dr. Thompson's CornerHouse interview of K.K.W. as a prior consistent statement. Thus, the jury heard K.K.W. state that Udoh touched "inside" her underwear and that he went "inside of there" "[w]ith his finger." In addition, Udoh did not object to other portions of Dr. Thompson's testimony in which she explained that, using an anatomically correct doll, K.K.W. showed that Udoh touched inside her genital opening.

II.

The second issue is whether the second-degree criminal-sexual-conduct charge with respect to K.K.W. was a lesser-included offense of the first-degree charge so that the district court erred in entering a conviction on both charges. "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2012). An included offense is "[a] lesser degree of the same crime." *Id.* Second-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct. *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). "The difference is simply one of sexual contact versus sexual penetration." *Id.*

Both the first-degree sexual-offense count and the second-degree count alleged that Udoh's conduct toward K.K.W. occurred between April 25, 2012 and February 19, 2013. Under this record, there is no evidence that the conduct supporting Udoh's conviction for

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second-degree criminal sexual conduct is separate from the conduct supporting his first-degree conviction. Udoh's first-degree conviction for penetration therefore includes the second-degree conduct of sexual contact.

Because the count for the second degree is a lesser-included offense of the one for first degree, we remand for the district court to vacate the judgment on the second-degree offense against K.K.W.

III.

Udoh raises several additional issues in his pro se supplemental brief, including that (1) the district court abused its discretion by limiting cross-examination of K.K.W.; (2) the district court erred by admitting certain evidence; (3) the prosecutor committed misconduct; and (4) the district court erred by denying his motion for a judgment of acquittal.

A. Cross-Examination of K.K.W.

Udoh first challenges the district court's ruling about the scope of questions regarding K.K.W.'s credibility. The district court has "broad discretion" to control the scope of cross-examination and may "impose reasonable limits on cross-examination of a prosecution witness." *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995). But the district court's broad discretion is limited by the Sixth Amendment, which guarantees a defendant the opportunity to cross-examine the witnesses against him. *Id.* at 640. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *Amos*, 658 N.W.2d at 203. "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation"

regarding the witness's "character for truthfulness or untruthfulness." Minn. R. Evid. 608(a)(1). But, although a party may inquire about specific instances of the witness's conduct concerning truthfulness or untruthfulness, extrinsic evidence may not be used to prove those specific instances. Minn. R. Evid. 608(b).

Before trial, the prosecutor moved to prohibit Udoh's attorney from impeaching K.K.W. with prior instances of lying through cross-examination of her or any other witnesses. The district court determined that "evidence of the alleged victim's prior conduct is not admissible pursuant to Minnesota Rules of Evidence 404 or 405" because it is "impermissible propensity evidence" and "the alleged victim's veracity is not an essential element of [the] charge[s]." The district court stated that Udoh could "inquire into specific instances of lying on cross-examination of the alleged victim" but must accept the answer. He could not introduce extrinsic evidence of past conduct.

Udoh argues that the district court's ruling was improper under *Goldenstein*. In *Goldenstein*, we reversed the appellants' convictions because "the [district] court's exclusion of evidence of the prior false allegations violated [the appellants'] constitutional right to present a defense." 505 N.W.2d at 340. But here, although K.K.W. admitted lying, there is no evidence that she made a prior false allegation of *sexual abuse*. Because Udoh only sought to introduce evidence that K.K.W. lied and told crazy stories, *Goldenstein* is not on point. Udoh also cites *State v. Benedict*, which discusses the admission of evidence showing the victim's source of sexual knowledge. *See* 397 N.W.2d 337, 341 (Minn. 1986) ("[A] [district] court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise

would likely infer that the defendant was the source of the knowledge."). Because Udoh did not seek to introduce evidence of K.K.W.'s sexual knowledge, *Benedict* is also not on point.

Under rule 608, the district court stayed within its range of discretion. It allowed Udoh to challenge K.K.W.'s credibility by asking about specific instances of untruthfulness. Because she admitted that she had not been truthful in those situations, they were not in dispute. The district court could prohibit Udoh from introducing extrinsic evidence regarding such undisputed, specific instances. Accordingly, we conclude that the district court did not abuse its discretion by limiting Udoh's cross-examination of K.K.W.[1]

B. Interview Evidence

Udoh next challenges the admission of evidence regarding the CornerHouse interviews and Dr. Thompson's testimony about her interviews of K.K.W. and K.C.W. on various grounds, including that the interviews were done without parental consent and that the CornerHouse and Dr. Thompson interviews were otherwise inadmissible. Udoh mentions a variety of additional objections which are not accompanied with analysis or legal argument. We conclude that these additional objections are not meritorious and do not further consider them.

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[1] Udoh also appears to argue that the school social worker was biased against him and that the district court erroneously precluded him from cross-examining her regarding her biases. But the district court made no ruling about this cross-examination and only prevented Udoh from introducing extrinsic evidence to challenge K.K.W.'s truthfulness.

1. Parental Consent; General Constitutional Claims

Once a local welfare agency receives a report of sexual abuse, it must conduct an investigation. Minn. Stat. § 626.556, subd. 10(b)(1) (2012). The agency has the "authority to interview, *without parental consent*, the alleged victim and any other minors who currently reside with . . . the alleged offender." *Id.*, subd. 10(d) (2012) (emphasis added). These authorized interviews may occur at school or any other facility. *Id.* The agency must only notify a parent "no later than the conclusion of the investigation or assessment." *Id.* Under this statute, county officials could interview K.K.W. and K.C.W. without a warrant, probable cause, or exigent circumstances. *See id.* In addition, the interviews did not require parental consent. *See id.* Furthermore, Udoh provides no evidence of any improper investigative procedures.

Given Minnesota's statute and the lack of applicable legal authority requiring a warrant or exigent circumstances to interview a suspected child victim of abuse, we conclude that the interviews did not violate any constitutional rights that may be asserted by Udoh.

2. CornerHouse Interviews

We review Udoh's assertions that the district court improperly admitted the CornerHouse interviews into evidence for an abuse of discretion. *Amos*, 658 N.W.2d at 203. The district court overruled Udoh's hearsay objection to the CornerHouse interviews and admitted the videos as prior consistent statements. A witness's prior statement that is consistent with the witness's testimony is not hearsay and is admissible if it is helpful to the jury in evaluating the witness's credibility. Minn. R. Evid. 801(d)(1).

The district court determined that although K.K.W.'s and K.C.W.'s testimonies were "not identical" to their CornerHouse statements, they were "reasonably consistent." In reviewing the record, we conclude that the district court did not abuse its discretion in determining that the girls' testimony was "reasonably consistent" with their CornerHouse statements.

In addition, the district court determined that the credibility of both K.K.W. and K.C.W. was challenged during their cross-examinations so the CornerHouse statements "would be helpful to the jury in evaluating their credibility." Udoh challenged K.K.W. about her truthfulness and relationship with Udoh, and pointed to K.C.W.'s initial statements denying abuse. Given the girls' respective testimony, their CornerHouse statements were helpful to the jury in evaluating their credibility. We conclude that the district court did not abuse its discretion in admitting the CornerHouse interviews as prior consistent statements.

3. Dr. Thompson's Interviews

Udoh appears to argue that Dr. Thompson's testimony was erroneously admitted because she did not record her interviews with K.K.W. and K.C.W. Because Udoh did not challenge this testimony at trial, we apply a plain-error standard of review. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Before reviewing "an unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Udoh does not cite to and we are not aware of any legal requirement that Dr. Thompson record her interviews. Udoh does not allege that Dr. Thompson's written report,

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which she referred to at trial, was deficient in any respect. Udoh also appears to argue that Dr. Thompson's interview of K.K.W. was insufficient because K.K.W. did not watch the screen during her physical examination. But Dr. Thompson testified that only about 50% of children watch the screen during their examinations. And even without watching the screen, K.K.W. was able to identify where Udoh touched her. Udoh cannot establish plain error regarding Dr. Thompson's testimony. *See id.* (explaining that a plain error must be clear or obvious).

C. Prosecutorial Misconduct

Udoh alleges that the prosecutor committed misconduct in (1) opening argument; (2) questioning witnesses; and (3) closing argument. Udoh also argues that the "cumulative effects" of prosecutorial misconduct violated his due-process and equal-protection rights. Most of his claims on appeal were not objected to at trial. The plain-error standard of review applies when no objection is made at trial. *Id.* at 299. If the appellant shows that the misconduct violated caselaw, a rule, or standard of conduct, the burden shifts to the state to show that the misconduct did not prejudice the defendant's substantial rights. *Id.* at 299-300. Furthermore, we "will reverse [a claim of generalized prosecutorial misconduct] only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). "If the misconduct was serious, the misconduct [must be] harmless beyond a reasonable doubt [meaning that] the verdict rendered was surely unattributable to the error. For less serious misconduct, the standard is whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* (quotations and citations omitted).

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1. Opening Argument

Udoh first challenges the beginning of the prosecutor's opening argument on the ground that it erroneously stated that Udoh sexually abused T.U. But in making his challenge, Udoh focuses on a phrase in a single sentence of the prosecutor's argument; we must consider the prosecutor's statement as a whole. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). It is clear from the full context that the prosecutor did not argue or make a claim that Udoh sexually abused T.U. We conclude that the assertion that the prosecutor's allusion to T.U. discredited her is not meritorious.

Udoh also asserts that the prosecutor erred by stating that the girls were "victims of sexual abuse." Before trial, Udoh's attorney moved the district court to direct "the parties to refer to K.K.W. and K.C.W. as complaining witnesses rather than as [victims]" because "[t]he ultimate issue in this case is whether or not they were victims . . . of sexual abuse." The district court allowed the prosecutor to refer to them as victims or alleged victims in opening and closing arguments as long as the prosecutor did not "overuse that word." The prosecutor only referred to K.K.W. and K.C.W. as "victims" once in her opening argument. She also twice referenced a generic victim of sexual abuse. We conclude the prosecutor's statement was not misconduct, let alone serious misconduct.

2. Questioning Witnesses

Udoh asserts that, when questioning witnesses, the prosecutor asked "misleading questions" and made "suggestive comments on facts." Udoh's attorney made several objections that the prosecutor was improperly leading the testimony of K.K.W. and K.C.W., and the district court overruled the objections. "Leading questions should not be

used on the direct examination of a witness except as may be necessary to develop the witness'[s] testimony." Minn. R. Evid. 611(c). But in context, leading questions were necessary to develop K.K.W.'s and K.C.W.'s testimony given the girls' ages and explanations of events. *See* Minn. R. Evid. 611(c) cmt. (stating that leading questions can be "necessary to develop testimony because of temporary lapse of memory, mental defect, immaturity of a witness, etc.").

Udoh also challenges the prosecutor's questions to T.U. about her relationship with the girls' father.[2] Udoh's attorney objected to this questioning. But the district court overruled the objection. It reasoned that while testifying on Udoh's behalf, T.U. had stated that the girls wanted to live with their dad and that this prior testimony opened the door to further questioning about the girls' father and the girls' reasons for wishing to live with him. *See State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (explaining that when one party opens the door "by introducing certain material," the other party has "a right to respond with material that would otherwise have been inadmissible" (quotation omitted)). Regardless, there is no evidence that this brief portion of T.U.'s testimony about the girls' father prejudiced Udoh. Udoh's attorney rebutted the prosecutor's questions in closing by arguing that the girls "fantasized" that life would be better with their dad. We conclude

[2] Udoh refers to this as "relationship evidence," but relationship evidence is evidence of similar conduct *by the defendant* against the victim of domestic abuse or other family members. *See* Minn. Stat. § 634.20 (2012). Evidence of the relationship between T.U. and the girls' father is not relationship evidence and does not require any special jury instructions. *See State v. Word*, 755 N.W.2d 776, 783, 785 (Minn. App. 2008) (defining relationship evidence and stating that such evidence requires a cautionary instruction).

that any testimony about the girls' father's abusive behavior had no effect on the jury's verdict against Udoh.

Udoh makes several other arguments about the questioning of witnesses, including that the prosecutor, "elicited false testimonies from government[] witness[es]," withheld evidence, improperly asked K.K.W. and K.C.W. whether they were telling the truth, and "made improper objections . . . to prevent the admission of relevant evidence." We find no support for these allegations. Small inconsistencies among different witnesses do not create an inference that the prosecutor elicited false testimony or withheld evidence. Udoh identifies no legal basis for his claims that the prosecutor's questions or objections were improper. Many of Udoh's cited objections were sustained by the district court, but we conclude that none of the adverse rulings was an abuse of discretion.

3. Closing Arguments

Udoh asserts that the prosecutor improperly endorsed the credibility of the state's witnesses. The prosecutor stated: "[K.K.W.] has no reason to lie to you" and "[K.C.W.] just like her sister has no reason to lie to you." She also stated that, if the girls had told the story "the same exact way every single time," she "would have been concerned these girls were lying." Finally, the prosecutor stated that she could not "think of a single reason" why the girls would lie about telling their mom about the abuse. "A prosecutor may argue as to the credibility of witnesses but may not throw [her] own opinion onto the scales of credibility." *State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003). As in *McNeil*, we conclude that here any error in a limited assertion of the girls' credibility in closing

argument is harmless given the girls' "descriptive and detailed testimony" regarding the abuse. *See id.* at 236.

Udoh also challenges the prosecutor's statement that part of Udoh's argument is a "red herring." A prosecutor may use the phrase "red herring" to "anticipat[e] those aspects of the evidence that the state need not prove at all but [to which] the defense [is expected to] attach unwarranted significance." *See State v. Moseng*, 379 N.W.2d 154, 156 (Minn. App. 1985).[3] The prosecutor was also free to discuss the girls' testimony about "whoopings," which was introduced by Udoh, to anticipate Udoh's argument that the girls lied because they were mad at him for punishing them. *See id.* As with opening statements, Udoh claims that the prosecutor's use of the word "victim" was prejudicial error. Twice in closing the prosecutor used the word "victim" to refer to K.K.W. and K.C.W. and three times to refer to the general investigative process. We conclude that use was within the limits allowed by the district court and does not constitute misconduct or prejudicial error.

Udoh cites several other statements during the prosecutor's closing arguments as evidence of prosecutorial misconduct. But, reading the arguments as a whole, *see Walsh*, 495 N.W.2d at 607, we can find no evidence of prosecutorial misconduct. Even if there was misconduct, it did not "play[] a substantial part in influencing the jury to convict" because the other evidence of Udoh's guilt was strong. *See Powers*, 654 N.W.2d at 678 (quotation omitted).

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[3] Udoh's cited case involves a prosecutor attacking the *defense attorney* in closing argument to suggest that the attorney conspired with the defendant to fabricate testimony. *See United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005). The prosecutor here made no such personal attacks against Udoh's attorney.

D. Denial of Motion for Judgment of Acquittal

Finally, Udoh argues that the district court erred by denying his motion for a judgment of acquittal because the evidence was insufficient to sustain his convictions. "At the close of evidence for either party, the defendant may move for . . . a judgment of acquittal on one or more of the charges if the evidence is insufficient to sustain a conviction." Minn. R. Crim. P. 26.03, subd. 18(1)(a). To grant this motion, the district court must determine "whether the evidence is sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005).

Udoh argues that the evidence was insufficient to show that he touched K.K.W. and K.C.W. with sexual intent. Viewing the record, we conclude that the state's evidence was "sufficient to present a fact question for the jury's determination." *See id.* at 75.

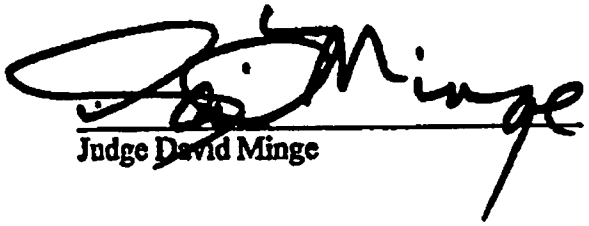
Udoh further argues that the evidence was insufficient to show that he met the requirement that to convict on the various degrees of sexual misconduct he was 48 or 36 months older than K.K.W. and K.C.W. Udoh's trial counsel specifically raised this issue in requesting reconsideration of the denial of his motion for a judgment of acquittal. In its case, the state established both girls' birthdays, ages at trial, and ages when the alleged abuse occurred. On cross-examination of Udoh, the state established Udoh's birthday and his age. Udoh presents no caselaw requiring the state to establish Udoh's age in its case in chief. And even before Udoh testified, the state had a "common sense argument" that Udoh met the age-difference requirement because the girls were 13 and 11 and Udoh was an adult, a college graduate, and married to the girls' mother. The evidence was sufficient for

the jury to conclude that Udoh was more than 48 months older than the girls at the time of the alleged offenses.

Finally, Udoh argues that the evidence was insufficient to support his convictions because the state did not establish specific dates for his offenses. The complaint listed a range of dates for Udoh's offenses, rather than specific dates. "[S]pecific dates need not be charged or proven in a sexual abuse case." *State v. Poole*, 489 N.W.2d 537, 544 (Minn. App. 1992), *aff'd*, 499 N.W.2d 31 (Minn. 1993). The girls' testimony supported the range of dates listed in the complaint.

Because the evidence was sufficient to submit the case to the jury, we conclude the district court did not err by denying Udoh's motion for a judgment of acquittal. *See Slaughter*, 691 N.W.2d at 74-75.

Affirmed in part, reversed in part, and remanded.



Judge David Minge