STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0363

Grant Lloyd Greenwood, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 1, 2021
Affirmed
Frisch, Judge

Anoka County District Court
File No. 02-CR-15-7596

David R. Lundgren, Adam T. Johnson, Lundgren & Johnson, PSC, Minneapolis, Minnesota; and

Andrew Irlbeck, Andrew Irlbeck, Lawyer Charterd, St. Paul, Minnesota (for appellant)

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Hooten, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this appeal following the denial of postconviction relief, appellant claims that the district court abused its discretion by rejecting his claim that his appellate counsel was ineffective for failing to raise multiple issues related to an erroneous jury instruction. We affirm.

FACTS

The state charged appellant Grant Greenwood with three counts of criminal sexual conduct related to sexual assaults of his girlfriend's underage daughter between 2009 and 2013: (1) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2010) (penetration or contact with a person under 13) (count 1); (2) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2010) (penetration of a victim under the age of 16/significant relationship/multiple acts over time) (count 2); and (3) second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010) (sexual contact with a victim under the age of 16/significant relationship/multiple acts over time) (count 3).

At the May 2016 jury trial, both parties had the opportunity to argue, edit, and finalize the jury instructions. The jury instruction for count 2 did not include an instruction requiring that the jury find that "the sexual abuse involved multiple acts committed

over an extended period of time," which is an element of the crime as defined by Minn. Stat. § 609.342, subd. 1(h)(iii). Greenwood's trial counsel did not object to the erroneous instruction.

During closing argument, the prosecutor stated that "[t]wo of the counts talk about the significant relationship, whereas count 1 we had different ages. . . . Count 3 talks about multiple acts over time. That was the difference between 1 and 2." The prosecutor then described each count individually and stated with respect to count 2 that "[a]gain, two different forms of penetration; oral sex, digital penetration. You don't need to have both. You only need to have one. You would only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that's enough."

The jury returned guilty verdicts on counts 2 and 3, but it was unable to reach a verdict on count 1. The district court sentenced Greenwood to 172 months' imprisonment on count 2.

In October 2016, Greenwood filed a direct appeal. His appellate counsel argued that the evidence was insufficient to sustain the verdict for count 2, and Greenwood submitted a pro se supplemental brief citing concerns about the investigation and prosecutorial misconduct regarding the statements in closing argument. *State v. Greenwood*, No. A16-1651, 2017 WL 3862802, at *2-3 (Minn. App. Sept. 5, 2017), *review denied* (Minn. Nov. 14, 2017). We affirmed the conviction. *Id.* at *4.

In May 2019, Greenwood filed a petition for postconviction relief, arguing that his appellate counsel was ineffective for failing to raise on direct appeal issues related to the erroneous jury instruction for count 2 and prosecutorial misconduct based on the prosecutor's misstatement of the law during closing argument. The district court held an evidentiary hearing, during which Greenwood's appellate counsel testified about his 35 years of experience as a criminal appellate public defender, which included his handling of at least 500 cases. He testified that he reviewed the entire trial record and identified issues related to the erroneous jury instruction, and that notwithstanding the erroneous instruction, he ultimately concluded based on his experience and research that claims related to the erroneous jury instruction were not meritorious.

The district court denied Greenwood's petition for postconviction relief. Greenwood appeals.

DECISION

The basis for each of Greenwood's arguments on appeal relates to the erroneous jury instruction for count 2. The relevant statute for count 2, criminal sexual conduct in the first degree, provides:

> A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:
>
> . . . .

> (h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the act, and:
>
> . . . .
>
> (iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat. § 609.342, subd. 1(h)(iii). The element set forth in clause (iii) was erroneously omitted from the jury instruction for count 2.

The relevant statute for count 3, criminal sexual conduct in the second degree, also contains the same element set forth in clause (iii) for count 2:

> A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:
>
> . . . .
>
> (h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and:
>
> . . . .
>
> (iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat § 609.343, subd. 1(h)(iii). The element set forth in clause (iii) was included in the jury instruction for count 3.

Against this backdrop, Greenwood argues that he is entitled to postconviction relief because his appellate counsel (1) did not raise claims regarding the erroneous jury instruction for count 2 on direct appeal; (2) failed to raise claims regarding prosecutorial misconduct on direct appeal; and (3) did not raise claims regarding ineffective assistance of trial counsel for failing to object to the erroneous jury instruction at trial. Greenwood also argues that the cumulative errors by appellate counsel merit relief.

We review the denial of a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017); *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014). An abuse of discretion exists where a postconviction court "has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous findings." *Pearson*, 891 N.W.2d at 596 (quotation omitted). In reviewing

> a postconviction court's denial of relief on a claim of ineffective assistance of counsel, we will consider the court's factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court's decision or conclude that the court abused its discretion because postconviction relief is warranted.

State v. Nicks, 831 N.W.2d 493, 503-04 (Minn. 2013).

Criminal defendants are guaranteed the right to effective assistance of appellate counsel under the Due Process Clause of the Fourteenth Amendment. *Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002). We evaluate the performance of appellate and trial counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). Counsel is ineffective when (1) counsel's performance fell below an objective standard of reasonableness, *and* (2) a reasonable probability exists that the outcome would have been different but for counsel's errors. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). Counsel's actions are objectively reasonable where "he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Pierson*, 637 N.W.2d at 579 (quotation omitted). "There is a strong presumption that counsel's performance 'falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case." *Mosley*, 895 N.W.2d at 591 (quotations omitted). "If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement." *Id.*

Appellate counsel "is not ineffective for failing to raise issues that themselves have no merit." *Evans v. State*, 788 N.W.2d 38, 45 (Minn. 2010). Rather, appellate counsel "is permitted to argue only the most

meritorious claims" and need not include all possible claims. *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (quoting *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007)). To demonstrate the second prong of *Strickland*, Greenwood must show "a reasonable probability" that the outcome of the direct appeal would have been different had appellate counsel raised the issue. *Id.*

I. Appellate counsel was not ineffective for failing to raise claims related to the erroneous jury instruction.

Greenwood first argues that appellate counsel did not "exercis[e] the customary skills and diligence that a reasonably competent attorney would" have because the district court plainly erred by instructing the jury regarding the elements of count 2 and the omission of element (iii) from the jury instruction for count 2 requires reversal of his conviction.

Because trial counsel did not object to the erroneous jury instruction, we apply a plain-error analysis. *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). Plain error exists when a district court commits (1) an error (2) that was plain and (3) that affected the defendant's substantial rights. *Id.* If we conclude that one element of this test is not met, we need not address the other elements. *State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017). If all three elements are satisfied, "[we] then assess[] whether [we] should address the error to ensure fairness and the integrity of the judicial

proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A district court commits plain error if it fails to properly instruct the jury on all elements of the offense charged. *Peltier*, 874 N.W.2d at 799-800. We review the jury instructions as a whole to determine whether they fairly and adequately explained the law. *Id.* at 797. We agree with the parties that the district court committed plain error by omitting an essential element in the jury instruction for count 2.

The omission of that element for count 2, however, did not affect Greenwood's substantial rights. We determine whether an omission of an element of a crime in a jury instruction affected an appellant's substantial rights by conducting a thorough examination of the record to determine whether the omission was sufficiently prejudicial in light of the standard of review. *State v. Watkins*, 840 N.W.2d 21, 28-29 (Minn. 2013). The omission does not automatically require a new trial. *Id.* at 28. "The reviewing court may consider, among other factors, whether: (1) the defendant contested the omitted element and submitted evidence to support a contrary finding, (2) the state submitted overwhelming evidence to prove that element, and (3) the jury's verdict nonetheless encompassed a finding on that element." *Id.* at 29.

Here, the district court included the identical element omitted from its instruction for count 2 in its instruction for count 3. The jury convicted Greenwood of count 3, a lesser-included offense of count 2,

necessarily finding beyond a reasonable doubt that Greenwood engaged in sexual abuse involving multiple acts committed over an extended period of time. *See State v. Holl*, 949 N.W.2d 461, 470 (Minn. App. 2020) (recognizing that second-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct), *review granted* (Minn. Nov. 17, 2020); *see also State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991) (holding that the difference between the statutes for first-degree and second-degree criminal sexual conduct is simply one of sexual contact versus sexual penetration); *compare* Minn. Stat. § 609.342, subd. 1(h)(iii), *with* Minn. Stat. § 609.343, subd. 1(h)(iii). The jury's verdict therefore encompassed a finding on the element at issue here and no prejudice to Greenwood occurred. In recognizing that the jury unanimously agreed that the state proved this element beyond a reasonable doubt, appellate counsel did not act below an objective standard of reasonableness in determining that raising the issue on appeal was not meritorious.

Greenwood argues his appellate counsel was ineffective because counsel erroneously interpreted *State v. Shamp*, 422 N.W.2d 520, 524-25 (Minn. App. 1988), *review denied* (Minn. June 10, 1988), to conclude that element (iii) was the same for both counts 2 and 3. Greenwood asserts that count 2 is a "penetration based offense" but that count 3 is a "contact based offense" and therefore the definition of sexual abuse involving multiple acts in element (iii) has a different meaning depending on the charge. But no authority supports

that argument, and the omitted element does not require a specific finding of multiple acts of penetration. And we have previously held that a prior version of Minn. Stat. § 609.342, subd. 1(h)(iii), requires only multiple acts of sexual abuse and not multiple acts of penetration. *Shamp*, 422 N.W.2d at 524-25.

The statute in *Shamp*, which contains the same language as the version under which Greenwood was charged, required that "[t]he actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and: . . . (v) the sexual abuse involved multiple acts committed over an extended period of time." Minn. Stat. § 609.342, subd. 1(h)(v) (1986). Because the term "sexual abuse" does not require penetration but instead more broadly includes "sexual contact other than penetration," the jury's finding in count 3 that "the sexual abuse involved multiple acts committed over an extended period of time" is the same finding required for a conviction under count 2.

Greenwood also argues that the time periods differed as to the acts covered by counts 2 and 3. This argument has no merit, as both offenses encompassed the same date range, January 1, 2009 to December 31, 2013. Appellate counsel therefore was not ineffective for failing to raise this unmeritorious argument on direct appeal, and we find no abuse of discretion in the denial of postconviction relief.

II. Appellate counsel was not ineffective for failing to raise claims related to prosecutorial misconduct.

Greenwood claims that appellate counsel should have argued on direct appeal that the prosecutor engaged in misconduct by stating that the jury need only find one act of penetration to convict Greenwood of count 2. Minn. Stat. § 609.342, subd. 1(h)(iii). Greenwood argues that the prosecutor misstated the law during her closing argument when she stated that (1) "Count 3 talks about multiple acts over time. That was the difference between 1 and 2" and (2) "Again, two different forms of penetration; oral sex, digital penetration. You don't need to have both. You only need to have one. You would only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that's enough." Trial counsel did not object to these statements.

We review a claim of unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing a plain error and, if successful, the burden shifts to the state to demonstrate that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id.*

We discern no misconduct by the prosecutor. The prosecutor's reference to "only need[ing] to have one act" related to the first element of penetration rather than the omitted element of sexual abuse involving

multiple acts. The plain language of the statute does not require multiple acts of *penetration*, but instead multiple acts of *sexual abuse*. *Shamp*, 422 N.W.2d at 524-25. And even if the prosecutor's statements to the jury were erroneous, the state has demonstrated that any error did not deprive Greenwood of a fair trial in light of the verdict for count 3. We therefore see no abuse of discretion in the denial of postconviction relief.

III. Appellate counsel was not ineffective for failing to raise claims related to the ineffective assistance of trial counsel.

Greenwood argues that on direct appeal, appellate counsel should have argued that his trial counsel was ineffective for failing to object to the erroneous jury instruction or the prosecutor's misstatement of the law. "When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the [petitioner] must first show that trial counsel was ineffective." *Evans*, 788 N.W.2d at 45 (alteration in original) (quoting *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007)).

Greenwood argues that trial counsel should have corrected the erroneous jury instruction and should have objected to the prosecutor's statements during closing arguments. We again review (1) whether trial counsel's performance fell below an objective standard of reasonableness and (2) whether a reasonable

probability exists that the outcome would have been different but for counsel's errors. *Mosley*, 895 N.W.2d at 591. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*" *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 1089 (2014).

We agree with Greenwood that trial counsel's performance fell below an objective standard of reasonableness insofar as counsel failed to object to an incomplete and erroneous jury instruction. But trial counsel's error did not affect the outcome of the proceedings because the omitted element was included in the instruction for count 3, a lesser-included offense of count 2, and the jury unanimously found that the state had proven the element beyond a reasonable doubt. Accordingly, we see no abuse of discretion in the denial of the petition for postconviction relief on this basis.

In light of the foregoing, appellate counsel was not ineffective for failing to raise a claim based on the cumulative effect of the alleged errors.

Affirmed.

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF ANOKA	TENTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, vs. Grant Lloyd Greenwood, Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING POST-CONVICTION RELIEF** Court File No: 02-CR-15-7596

(Filed Jan. 17, 2020)

The above-entitled matter came on for an Evidentiary Hearing on November 7, 2019, before the Honorable Dyanna L. Street, Judge of District Court, pursuant to Defendant's Petition for Post-conviction Relief filed May 21, 2019. The State filed an Answer and Memorandum Objecting to Requested Post-conviction Relief on June 10, 2019. With permission from this Court, Petitioner filed a Reply Memorandum on June 28, 2019.

Beth A. Beaman, Esq., Assistant Anoka County Attorney, appeared on behalf the State of Minnesota. David R. Lundgren, Esq. and Andrew Irlbeck, Esq., appeared with and on behalf of Petitioner Grant Greenwood.

Based on the records, files, and proceedings, and the arguments of counsel, this Court enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On November 18, 2015, Petitioner was charged by Complaint with three counts of criminal sexual conduct:

   a. **Count I**, Criminal Sexual Conduct in the First Degree, in violation of Minn. Stat. § 609.342, subd. 1(a) (Sexual contact, victim under 13 years of age, actor more than 36 months older);

   b. **Count II**, Criminal Sexual Conduct in the First Degree, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (Penetration, significant relationship, victim under 16 years of age, multiple acts over extended period of time); and

   c. **Count III**, Criminal Sexual Conduct in the Second Degree, Minn. Stat. § 609.343, subd. 1(h)(iii) (Sexual contact, significant relationship, victim under 16 years of age, multiple acts over extended period of time).

2. The State verbally amended the Complaint prior to trial and extended the offense date ranges for Counts II and III from January 1, 2009 – January 1, 2012 to January 1, 2009 – December 31, 2013.

3. Petitioner was also charged by separate complaint with misdemeanor domestic assault. Prior to the start of trial, the two files were joined for trial and the misdemeanor charge was put to the jury as Count IV.

4. The victim for all charges was the minor daughter of Petitioner's then girlfriend, V.M.

5. A jury trial was held May 9, 2016 through May 16, 2016.

6. Petitioner testified at trial and denied having any sexual contact with V.M.

7. The jury instructions were argued, edited and finalized on the record. The final jury instructions were both read aloud to the jury by this Court and provided in written form for the jury to use during deliberations. Petitioner's trial counsel did not object to the agreed upon jury instructions.

8. The elements portion of the final jury instructions for Counts I, II and III were as follows:

COUNT I

CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE – SEXUAL PENETRATION COMPLAINANT UNDERAGE ELEMENTS

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally sexually penetrated V.K.M.

> Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

> Any intrusion, however slight, of any part of one person's body (or of any object used by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

Second, at the time of the defendant's act, V.K.M. had not reached her thirteenth birthday.

Mistake as to V.K.M.'s age is not a defense.

Consent is not a defense to this charge.

> It is immaterial whether or not the sexual penetration was coerced.

Third, the defendant was more than 36 months older than V.K.M.

Fifth, the defendant's act took place on (or about) January 1, 2009 – December 31, 2013, in Anoka County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

COUNT II

CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE – COMPLAINANT UNDER 16 – SIGNIFICANT RELATIONSHIP ELEMENTS

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally sexually penetrated V.K.M.

> Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.
>
> Any intrusion, however slight, of any part of one person's body (or of any object used by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

Second, at the time of the defendant's act, V.K.M. had not reached her sixteenth birthday. Consent is not a defense to this charge.

> Mistake as to V.K.M.'s age is not a defense.
>
> It is immaterial whether or not the sexual penetration was coerced. Third, the defendant had a significant relationship with V.K.M.
>
> "Significant relationship" means a situation in which the defendant is V.K.M.'s parent, stepparent, or guardian, or any of the following persons related to V.K.M. by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or an adult who jointly resides intermittently or regularly in the same dwelling as V.K.M. and is not V.K.M.'s spouse.

Fourth, the defendant's act took place on (or about) January 1, 2009 – December 31, 2013, in Anoka County.

If you find that each of these elements has been proven beyond a reasonable doubt, defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

COUNT III

CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE – SIGNIFICANT RELATIONSHIP – COMPLAINANT UNDER 16 ELEMENTS

The elements of criminal sexual conduct in the second degree are:

First, the defendant intentionally touched V.K.M.'s intimate parts or the clothing over the immediate area of V.K.M.'s intimate parts, or caused the touching of V.K.M.'s intimate parts or the clothing over the immediate area of V.K.M.'s intimate parts.

> The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

Second, the defendant's act was committed with sexual or aggressive intent. Third, the defendant had a significant relationship with V.K.M.

> A "significant relationship" means a situation in which the defendant is V.K.M.'s parent, stepparent, or guardian, or any of the following persons related to V.K.M. by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew,

> niece, grandparent, great-grandparent, great-uncle, great-aunt, or an adult who jointly resides intermittently or regularly in the same dwelling as V.K.M. and is not V.K.M.'s spouse.

Fourth, V.K.M. was under 16 years of age at the time of the act.

> Mistake as to V.K.M.'s age is not a defense to this charge.

Consent is not a defense to this charge.

Fifth, the sexual abuse involved multiple acts committed over an extended period of time. Sixth, the defendant's act took place on (or about) January 1, 2009 – December 31, 2013, in Anoka County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

9. There is no dispute that the jury instruction read to, and provided in hard copy, to the jury for Count II did not include the element of "the sexual abuse involved multiple acts committed over an extended prior of time" ("omitted element"). There is also no dispute that this omission was an error.

10. During her closing argument, the prosecutor argued to the jury that to convict Defendant of Count II, "you only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that's enough." The prosecutor also failed to advise the jury of the omitted element in Count II.

11. On May 16, 2016, the jury notified the Court that they had reached a verdict on three counts, but could not reach a verdict on one count. Counsel and Defendant agreed, on the record, to accept the jury's partial verdict, and the following verdicts were received by this Court:

a. **COUNT I**: the charge of **CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE – SEXUAL PENETRATION COMPLAINANT UNDERAGE**, in violation of Minnesota Statutes §§ 609.342, Subd. 1(a); 609.342, Subd. 2(a); 609.3455; 609.101;

RETURNED: No verdict reached.

b. **COUNT II**: the charge of **CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE – COMPLAINANT UNDER 16 – SIGNIFICANT RELATIONSHIP**, in violation of Minnesota Statutes §§ 609.342, Subd. 1(h)(iii); 609.342, Subd. 2; 609.3455; 609.101;

RETURNED: Guilty.

c. **COUNT III**: the charge of **CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE – COMPLAINANT UNDER 16 – SIGNIFICANT RELATIONSHIP**, in violation of Minnesota Statutes §§ 609.343, Subd. 1(h)(iii); 609.343, Subd. 2(a) and (b); 609.3455; 609.101;

RETURNED: Guilty.

d. **COUNT IV**: the charge of **DOMESTIC ASSAULT – INTENT TO CAUSE FEAR OR INFLICT BODILY HARM**, in violation of Minnesota Statutes §§ 609.2242, Subd. 1(1).

RETURNED: Not Guilty.

12. On July 19, 2016, this Court sentenced Petitioner to 172 months on Count II, First Degree Criminal Sexual Conduct in violation of Minn. Stat. 609.342, subd. 1(h)(iii).

13. Petitioner appealed his conviction to the Minnesota Court of Appeals and was represented by Steven P. Russett, Esq. of the Minnesota Office of the Appellate Public Defender. On Petitioner's behalf, Mr. Russett argued that there was insufficient evidence to sustain the jury's verdict for Count II. Petitioner also filed a *pro se* supplemental brief citing concerns about the investigation and the prosecutor's misconduct for statements made during closing argument.

14. On September 5, 2017, the Minnesota Court of Appeals affirmed the conviction, concluding that there was sufficient evidence to support the jury's verdict on Count II. *See State v. Greenwood*, 2017 WL 3862802 (Minn. Ct. App. September 5, 2017), *rev. denied* Nov. 14, 2017. The unpublished decision stated:

> To support a conviction under [Minn.Stat. §609.342, subd. 1(h)(iii)], the state had to prove beyond a reasonable doubt that appellant had a significant relationship with [the victim], that [the victim] was under the age of

> 16 years old at the time of the sexual penetration, and that the 'sexual abuse involved multiple acts committed over an extended period of time.'

15. The Minnesota Court of Appeals concluded:

> [The victim's] testimony, if believed, was sufficient to establish appellant's guilt of first-degree criminal sexual conduct under section 609.342, subd. 1(h)(iii). Although [the victim's] testimony could have been more specific, and she clearly expressed her disdain for appellant, giving her a motive to fabricate the alleged events, appellant's attorney cross-examined the state's witnesses about these issues and discussed them in closing argument. The jury's verdict reflects its rejection of those arguments in favor of the state's witnesses and evidence, and it is well settled that we defer to the jury's assessment of witness credibility. . . . Therefore, in light of the deference owed to the jury's credibility determinations, the evidence was sufficient to sustain appellant's conviction of first-degree criminal sexual conduct.

16. On May 21, 2019, Petitioner filed a Petition for Post-Conviction Relief with this Court alleging he was denied effective assistance of appellate counsel because: (1) appellate counsel failed to raise any claims related to the plainly erroneous jury instruction; (2) appellate counsel failed to raise any claims related trial counsel's failure to object to the erroneous jury instruction; (3) appellate counsel failed to raise any

claims regarding alleged prosecutorial misconduct in requesting an incorrect jury instruction and affirmatively misstating the law to the jury; and (4) appellate counsel failed to raise any claims regarding the cumulative effect of the alleged errors.

17. All of the alleged issues relate to the omitted element for Count II, that "the sexual abuse included multiple acts over an extended period of time." *See* Minn. Stat. § 609.342, subd. 1 (h)(iii).

18. Petitioner argues that appellate counsel's performance fell below an objective standard of reasonableness and asserts that an appellate claim regarding the omitted element for Count II would have prevailed on appeal. Therefore, Petitioner argues he was denied effective assistance of appellate counsel because counsel could not have legitimately concluded that the claim would not have prevailed on appeal.

19. Petitioner's appellate counsel, Steven Russett, appeared at the November 7, 2019 hearing pursuant to Petitioner's subpoena.

20. Petitioner was sworn in, waived attorney client privilege with respect to Mr. Russett.

21. Mr. Russett testified that:

a. He has been a criminal appellate public defender for 35 years handling at least 500 cases which have resulted in a written decision and has represented clients convicted of varying degrees of criminal

offense from gross misdemeanors to felonies.

b. He reviewed Petitioner's case in the same manner he reviews all cases, by reviewing the trial court records and the trial court transcript to identify issues for appeal.

c. While he had identified the issue of the omitted element in the jury instruction for Count II, Mr. Russett concluded that raising the issue on appeal was not likely to be successful for two reasons:

    i. First, the reviewing court was likely to review the omission of the element as a constructive amendment under Rule 17. The instruction given was for the same degree of offense charged under a different subdivision and the Court of Appeals routinely holds that a constructive amendment in this situation is proper; and

    ii. Second, if reviewed as an omitted element, the claim would be analyzed as plain error, and Petitioner would be unable to show that the error affected his substantial rights. Mr. Russett opined that because the jury found Petitioner guilty of Count III, and that count contained the same element missing from Count II – that "the sexual abuse

> included multiple acts over an extended period of time" – there was "really no chance that the appellate court would grant any relief on that issue."

22. This Court finds that Petitioner has failed to prove the allegations in the Petition, specifically that appellate counsel's representation fell below an objective standard of reasonableness.

CONCLUSIONS OF LAW

1. Petitioner has the burden of proving by a preponderance of the evidence the facts alleged in the Petition.

2. Petitioner's claims all rest on his assertion of ineffective assistance of appellate counsel. As such, Petitioner must show: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668; *Carridine v. State*, 867 N.W. 488, 493-94 (Minn. 2015).

APPELLATE COUNSEL'S REPRESENTATION OF PETITIONER WAS OBJECTIVELY REASONABLE AND PROFESSIONAL

3. The first prong of the *Strickland* test requires Petitioner to show that "counsel's performance fell

below an objective standard of reasonableness." *Carridine*, 867 N.W.2d at 494.

4. Appellate counsel does not have a duty to raise all possible issues, and may choose to present only the most meritorious claims on appeal. *Zornes v. State*, 880 N.W.2d 363, 371 (Minn. 2016); *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008). Appellate counsel does not act unreasonably by not raising issues that counsel could have concluded would not prevail. *Wright v. State*, 765 N.W.2d 85 (Minn. 2009).

5. A Petitioner alleging ineffective assistance of appellate counsel must overcome the strong presumption that appellate counsel has exercised reasonable professional judgment in selecting the issues to raise on appeal. *Zornes*, 880 N.W.2d at 371; *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

6. An attorney's representation is effective if the attorney "exercise(s) the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Heinkel*, 332 N.W.2d 322, 326 (Minn. 1982).

7. Here, Petitioner had the benefit of being represented by Mr. Russett, who has spent his entire 35 year career as a criminal defense appellate attorney. Mr. Russett is familiar with the possible issues relating to the omission of an element from a jury instruction and has raised that issue on behalf of other clients. Mr. Russett testified that he identified the issue of the omitted element in Petitioner's case and, after reviewing the entire court record, combined with his research

and experience, he legitimately and reasonably concluded that raising the issue in Petitioner's case would be without merit. Mr. Russett based his reasoning on the fact that: (1) there was no prejudice to Petitioner as he was convicted of the same degree of offense simply under a different subdivision; and (2) the jury finding the omitted element of Count II when they convicted Petitioner of Count III. Instead, Mr. Russett appealed Petitioner's conviction based on the sufficiency of the evidence as he had discussed with Petitioner.

EVEN IF THE COURT FINDS THAT APPELLATE COUNSEL'S PERFORMANCE WAS UNREASONABLE, PETITIONER CANNOT SHOW THAT BUT FOR COUNSEL'S PERFORMANCE, THE OUTCOME OF HIS APPEAL WOULD HAVE BEEN DIFFERENT

8. The second prong of the *Strickland* test requires that Petitioner establish "a reasonable probability that absent his appellate counsel's error [in not raising the issue of the omitted], the outcome of his direct appeal would have been different." *Ives v. State*, 655 N.W.2d 633, 637 (Minn. 2003) (citation omitted). To determine whether the outcome of Petitioner's appeal would have been different, this Court must review the merits of the underlying claim.

9. "Failure to properly instruct the jury on all elements of the offense charged is plain error." *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). *See State v. Baird*, 654 N.W.2d 105, 113 (Minn.

2002) (plain error analysis applicable to unobjected-to erroneous jury instruction).

10. Plain error review requires reversal only if there was: (1) an error, (2) that is plain, and (3) that affects the petitioner's substantial rights. *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011). An error affects petitioner's substantial rights if the error was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If the first three requirements of the plain error test are met, a reviewing court must then assess whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 20005) (quotation omitted).

11. Here, the parties agree that the omission of the "multiple acts of sexual abuse over an extended period time" element from Count II was plain error. The question for this Court, then, is whether the error affected Petitioner's substantial rights.

12. "The omission of an element of a crime in a jury instruction does not automatically require a new trial. Instead, the reviewing court must conduct a thorough examination of the record to determine whether the omission of an element of the charged offense from the jury instruction was sufficiently prejudicial in light of the standard of review." *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013).

13. To determine whether the plain error affected Petitioner's substantial rights, all relevant factors must be considered. *Id.* These relevant factors

include, but are not limited to: (1) whether Petitioner contested the omitted element at trial and submitted evidence to support a contrary finding, (2) whether the state presented overwhelming evidence to prove the element, and (3) whether the jury's verdict encompassed a finding on the element notwithstanding the omission from the jury instructions. *Id.* at 29. These factors "are not exclusive, do not comprise a rigid test, and it does not necessarily follow that each must be satisfied." *State v. Peltier*, 874 N.W.2d 792, 801 (Minn. 2016) (quoting *State v. Watkins*, 840 N.W.2d 21, 29) (Minn. 2013)).

DID PETITIONER CONTEST THE OMITTED ELEMENT AT TRIAL.

14. Petitioner testified that he did not sexually abuse the victim, whether by penetration or contact, and that he did not sexually abuse the victim multiple times over an extended period of time.

23. While Petitioner argues that this factor weighs in his favor, it is clear from the jury's verdict that they did not believe Petitioner's testimony. Likewise, the Minnesota Court of Appeals rejected Petitioner's sufficiency of the evidence argument. *See State v. Greenwood*, 2017 WL 3862802 (Minn. Ct. App. September 5, 2017), *rev. denied* Nov. 14, 2017.

DID THE STATE PRESENT OVERWHELMING EVIDENCE TO PROVE THE ELEMENT.

15. Petitioner argues that the second factor favors him because the State's case relied almost entirely on the testimony of the victim and with no physical evidence, pictures, messages, or an admission of guilt by Petitioner. This is essentially repeating Petitioner's argument that there was insufficient evidence to support his conviction.

16. The Court of Appeals rejected the sufficiency of the evidence argument and held that victim's testimony, "if believed, was sufficient to establish appellant's guilt of first-degree criminal sexual conduct under section 609.342, subd. 1(h)(iii)." *Id.* at *6-7. In addition, the Court of Appeals noted that the testimony of the victim's mother "tends to corroborate V.M.'s testimony concerning the sexual abuse." *Id.* at *6.

Did the Jury's Verdict Encompass a Finding on the Omitted Element.

17. Petitioner argues that the jury's finding of "multiple acts of abuse over an extended period of time" in Count III does not encompass the omitted element from Count II. Petitioner argues there is a "substantial possibility that the facts found by the jury support a finding of that element for Count 3, but not Count 2." In support, Petitioner states that there is no way to "conclude that the act of sexual penetration the jury found for Count 2 happened during the 'extended

period of time' that it found sexual abuse was committed for Count 3." Petitioner's argument is confusing at best and is without merit.

18. Counts II and III allege the same time period for Petitioner's conduct – January 1, 2009 through December 31, 2013. Likewise, Count II required the jury to find only one act of penetration, not multiple acts of penetration during the "extended period of time" of sexual abuse. *See State v. Shamp*, 422 N.W.2d 520, 524-25 (Minn. Ct. App. 1988) (holding that "[i]f the legislature had intended to require multiple acts of penetration, such language could have been inserted in subdivision [1(h)(iii)]."

19. Based on this Court's review of the *Watkins* factors, the omitted element from the jury instructions in Count II did not prejudice Petitioner and was not likely to affect the outcome of Petitioner's appeal had appellate counsel raised the issue.

20. Petitioner also argues that the prosecutor misstated the law in closing argument when she stated that the jury need only find one act of penetration to convict Petitioner on Count II, and claims this error affected his substantial rights and that the outcome of his appeal would have been different had appellate counsel raised the issue. Petitioner's trial counsel did not object to the prosecutor's statements.

21. Similar to unobjected-to jury instructions, the plain error doctrine also applies to unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 297-98 (Minn. 2006).

22. The prosecutor did not misstate the law. As discussed above, the jury need only find one act of penetration to convict Petitioner on Count II. To the extent the argument is that the prosecutor's misconduct was her failure to request the omitted element, the analysis contained herein supports this Court's conclusion that the claim is without merit.

23. Having reviewed the Petition, files, records, and applicable law in this proceeding, this Court concludes that Petitioner has not established that appellate counsel's representation was anything other than objectively reasonable and professional. In addition, Petitioner has not established prejudice from the alleged errors of appellate counsel.

Based on the foregoing Conclusions of Law, the Court issues the following:

ORDER

1. Petitioner's Petition for Post-Conviction Relief is DENIED.

SO ORDERED.

BY THE COURT:

DATED: 1/17/20 /s/ Dyanna L. Street
THE HONORABLE DYANNA L. STREET
JUDGE OF DISTRICT COURT

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1651

State of Minnesota,
Respondent,

vs.

Grant Lloyd Greenwood,
Appellant.

Filed September 5, 2017
Affirmed
Florey, Judge

Anoka County District Court
File No. 02-CR-15-7596

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

Anothony C. Palumbo, Anoka County Attorney, Blair Buccione, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the evidence was insufficient to sustain the jury's finding of guilt. Appellant also filed a pro se supplemental brief arguing that there were deficiencies in the investigation by law enforcement and that the prosecutor committed prejudicial misconduct during closing arguments. We affirm.

FACTS

In early 2009, appellant Grant Lloyd Greenwood began a romantic relationship with R.M. Shortly thereafter, appellant moved in with R.M., her two sons, and her nine-year-old daughter, V.M. After moving in with the family, appellant felt that it was his responsibility "to assume a role of a father." And when R.M. was required to travel for work, which was frequently, appellant supervised the children in her absence.

Shortly after appellant moved in with R.M., V.M. complained to her mother that appellant "put her foot on his penis." R.M. discussed the issue with appellant and V.M., and appellant told R.M. that "he would never do anything like that because he . . . had been a police officer." According to R.M., she "did not do anything" because she "believed" appellant and "trusted and loved" him.

Several years later, on November 17, 2015, an argument occurred between appellant and V.M. The argument culminated with appellant grounding V.M. from going to soccer practice that night, which greatly upset V.M. According to V.M., she then tried to leave, but appellant continued to yell at her, and would "propel his body forward so his stomach was – would push [her] back."

V.M. told appellant that she was "going to call the police," and then left and went next door to her friend's house. V.M. was "hysterical," and told her friend's mother, H.H., that appellant had "bumped" her with his body. According to H.H., V.M. continued to be "very hysterical," and repeatedly said that she "can't do this anymore," and that she did not "want to go home." H.H., who is a police officer, eventually asked V.M. if anything "sexual" happened. When V.M. was finally able to compose herself, she told H.H. that "[i]t happened in middle school."

H.H. contacted R.M., who arrived at H.H.'s house, where V.M., told her mother that she had been sexually abused by appellant. R.M. then called the police and, shortly thereafter, V.M. told Detective Thomas Strusinski during a videotaped interview that appellant had sexually abused her from shortly after he moved in until she was in middle school. Appellant was subsequently charged with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2012) (sexual contact with a person under the age of 13); one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd.

1(h)(iii) (2012) (sexual penetration with a person under the age of 16 and the sexual abuse included multiple acts over an extended period of time by an individual with a significant relationship); and one count of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2012) (sexual contact with a person under the age of 16 and the sexual abuse included multiple acts over an extended period of time by an individual with a significant relationship). Appellant was also charged by separate complaint with misdemeanor domestic assault. The domestic assault charge was then joined for trial with the sexual-assault charges.

At trial, V.M.'s videotaped interview with Detective Strusinski was played for the jury. The videotaped statement, along with V.M.'s testimony, established that shortly after appellant moved in, he would rub V.M.'s feet against his crotch while they watched television. According to V.M., appellant "gradually" began "doing more stuff," such as taking off her shirt and bra to "feel" and "lick" her breasts. V.M. claimed that the sexual abuse progressed to where appellant would digitally penetrate her vagina and put "his mouth on [her] vagina." V.M. further stated that because she did not want to touch appellant's penis, appellant "would want [her] to kiss his neck while" he masturbated. V.M. reported that the abuse stopped when she was in the eighth grade after appellant "made [her] touch his penis" and she told him that the sexual abuse was "wrong."

Appellant testified at trial and acknowledged the confrontation with V.M. on November 17. But appellant denied pushing V.M.; instead, he claimed that V.M. pushed him. Appellant also denied having any sexual contact with V.M.

The jury found appellant not guilty of misdemeanor domestic assault, and could not reach a verdict on the charge of first-degree criminal sexual conduct – sexual contact with a person under the age of 13. But the jury found appellant guilty of second-degree criminal sexual conduct, and first-degree criminal sexual conduct – sexual penetration with a person under the age of 16 and the sexual abuse included multiple acts over an extended period of time by an individual with a significant relationship. Appellant was then sentenced to 172 months in prison. This appeal followed.

DECISION

I.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to allow the jury to reach the verdict that it reached. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). We will not disturb the verdict if the jury, acting with due regard for the presumption of

innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii). To support a conviction under this statute, the state had to prove beyond a reasonable doubt that appellant had a significant relationship with V.M., that V.M. was under the age of 16 years old at the time of the sexual penetration, and that the "sexual abuse involved multiple acts committed over an extended period of time." *Id.*

Appellant argues that "V.M.'s uncorroborated testimony fails to establish beyond a reasonable doubt that [he] committed criminal sexual conduct." To support his claim, he cites *State v. Foreman*, in which the supreme court clarified that the lack of corroboration of a victim's testimony may require reversal if there are *additional* reasons to question the victim's credibility. 680 N.W.2d 536, 539 (Minn. 2004). Appellant contends that there are "many reasons" to doubt V.M.'s accusations, including (1) her hatred of appellant; (2) her delay in reporting the alleged abuse; (3) the lack of physical or medical evidence corroborating the allegations; and (4) the "vagueness and uncertainty" of V.M.'s testimony. Appellant argues that in light of these "additional reasons" to question V.M.'s credibility, his conviction must be reversed.

We disagree. In *Foreman*, the supreme court reiterated that "a conviction can rest on the uncorroborated testimony of a single credible witness." 680 N.W.2d at 539 (quoting *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969)). Although the supreme court acknowledged that reversal of a conviction may be warranted in situations where there are "additional reasons to question the victim's credibility," the court stated that "[a]s long as the evidence [is] sufficient to reasonably support the jury's finding, the credibility of a witness [is] for the jury to determine." *Id.* The supreme court then affirmed the defendant's conviction, concluding that "there were no other reasons to question [the victim's] credibility and her testimony at trial was not contradicted." *Id.*

Here, V.M. reported to Detective Strusinski that shortly after moving in with R.M., appellant began rubbing V.M.'s feet against his crotch while they watched television. V.M. also reported that appellant "gradually" began "doing more stuff," such as removing her shirt to "lick" and "feel" her breasts, and that the sexual abuse progressed to where appellant digitally penetrated her vagina and put "his mouth on [her] vagina." V.M.'s testimony at trial was consistent with her videotaped statement to Detective Strusinski that was played for the jury. Moreover, R.M. testified that shortly after appellant moved in, V.M. "complained that [appellant] put her foot on his penis." R.M.'s testimony tends to corroborate V.M.'s testimony concerning the sexual abuse. In addition, the record reflects that V.M. was extremely emotional at the time she reported

the abuse, which further tends to corroborate her testimony. *See State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (stating that evidence of the victim's emotional condition at the time she complained to others is corroborating evidence of a victim's testimony). V.M.'s testimony, if believed, was sufficient to establish appellant's guilt of first-degree criminal sexual conduct under section 609.342, subd. 1(h)(iii). Although V.M.'s testimony could have been more specific, and she clearly expressed her disdain for appellant, giving her a motive to fabricate the alleged events, appellant's attorney cross-examined the state's witnesses about these issues and discussed them in closing argument. The jury's verdict reflects its rejection of those arguments in favor of the state's witnesses and evidence, and it is well settled that we defer to the jury's assessment of witness credibility. *State v. Green*, 719 N.W.2d 664, 673-74 (Minn. 2006). Therefore, in light of the deference owed to the jury's credibility determinations, the evidence was sufficient to sustain appellant's conviction of first-degree criminal sexual conduct.

II.

Appellant filed a pro se supplemental brief arguing that (1) there were deficiencies in the investigation that rendered his conviction unfair and (2) the prosecutor engaged in prejudicial misconduct during closing argument.

A. Investigation

"[T]he 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. . . ." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). "To establish a *Brady* violation, it must be true that: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or it is impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) prejudice to the accused resulted." *State v. Brown*, 815 N.W.2d 609, 622 (Minn. 2012).

Appellant argues that the investigation was insufficient because it should have included an examination of his criminal history, his computer, and V.M.'s cell phone. Appellant contends that "[i]f [law enforcement] did conduct any investigation following [his] arrest, and found absolutely nothing, which is exactly what [appellant] is confident has occurred," then "there is a very clear *Brady* violation in this case." But appellant fails to establish any of the elements necessary to demonstrate that a *Brady* violation occurred. Moreover, appellant fails to support his argument with legal authority or arguments beyond mere speculation. Therefore, no further consideration of his argument is necessary. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) ("We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority."), *cert denied*, 556 U.S. 1134 (2009).

B. Prosecutorial misconduct

Appellant claims that the prosecutor committed misconduct during closing argument by using the term "illiosyncratic responses." But appellant did not object to the alleged misconduct during closing argument. Therefore, the issue is reviewed under a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Under this standard, the defendant must first establish that the misconduct constitutes error and that the error was plain. *Id.* If prosecutorial misconduct amounts to plain or obvious error, the burden shifts to the state to demonstrate that its misconduct did not prejudice the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

Here, as the state points out, the prosecutor did not use the term "illiosyncratic responses"[1] in her closing argument; she used the term "idiosyncratic details." The prosecutor then defined the term as "details – sensing details, descriptions." The prosecutor's definition of the term is accurate, as was her use of the term. *See The American Heritage Dictionary of the English Language* 897 (3rd ed. 1992). Therefore, appellant is unable to demonstrate that the prosecutor committed misconduct during closing argument.

Affirmed.

/s/ James B. Florey

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[1] "Illiosyncratic" does not appear to be a recognized word in the English language.

STATE OF MINNESOTA

IN SUPREME COURT

A20-0363

Grant Lloyd Greenwood,

Petitioner,

vs.

State of Minnesota,

Respondent.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Grant Lloyd Greenwood for further review be, and the same is, denied.

Dated: April 28, 2021

BY THE COURT:

/s/ Lorie S. Gildea
Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA **COURT OF APPEALS**

JUDGMENT

Grant Lloyd Greenwood, petitioner, Appellant, vs. State of Minnesota, Respondent.

Appellate Court # A20-0363

Trial Court # 02-CR-15-7596

Pursuant to a decision of the Minnesota Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Anoka County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly.

Dated and signed:
May 5, 2021

FOR THE COURT

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: /s/ Kelly MacGregor
Assistant Clerk