STATE OF MINNESOTA
IN COURT OF APPEALS
A08-619

State of Minnesota,
Respondent,

vs.

Terry Lee Caldwell,
Appellant.

Filed August 25, 2009
Affirmed in part, reversed in part, and remanded
Ross, Judge

Ramsey County District Court
File No. 62-K8-07-002294

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Marie Wolf, Interim Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

This is a direct appeal from conviction after a criminal trial in which the jury found Terry Caldwell guilty of first- and second-degree criminal sexual conduct for sexually abusing A.A., a five-year-old girl. Caldwell argues that his convictions should be reversed because the district court refused to allow him to inquire into A.A.'s potential alternative source of knowledge of sexual activity; the district court allowed the state to introduce three prior felony convictions to impeach Caldwell's testimony; the prosecutor told the jury that to acquit, it must believe that A.A. is a liar; and the district court allowed the jury to review A.A.'s recorded interview twice during its deliberations. Alternatively, Caldwell contends that the district court erred by adjudicating him guilty of both charges and that his conviction for second-degree criminal sexual conduct should be vacated.

We conclude that the district court did not abuse its discretion in its evidentiary rulings, that Caldwell's unobjected-to allegation of prosecutorial misconduct fails, and that any error that occurred at trial does not warrant reversal of Caldwell's first-degree criminal-sexual-conduct conviction. But the district court erred by adjudicating Caldwell guilty of second-degree criminal sexual conduct in addition to the first-degree charge. We therefore affirm in part, reverse in part, and remand for the district court to vacate the conviction of second-degree criminal sexual conduct.

FACTS

In June 2007, five-year-old A.A. and her four-year-old brother, S.J., spent the night at the apartment of their grandmother, Tammy Padelford, in St. Paul. Fifty-three-year-old Terry Caldwell was at Padelford's apartment when the children arrived, and he also spent the night. Padelford met Caldwell at a bar two weeks earlier. Caldwell and Padelford planned to sleep on a portable mattress in the "front room" of the apartment, while A.A. and S.J. slept in the bedroom. Padelford went to sleep sometime around 10:00 p.m. after drinking with Caldwell. The next morning, Caldwell complained that the children had kept him up all night.

A.A. and S.J.'s mother picked the children up around 4:30 p.m. Almost immediately after getting into the car, A.A. told her mother that she wanted to go home and take a bath because the man in Padelford's apartment "put his mouth on [her] crotch." S.J. also told his mother that he saw "T.C.," the man in Padelford's apartment, "put his mouth on [A.A.'s] crotch." A.A.'s mother immediately called the police and returned to Padelford's apartment. The police arrived and interviewed A.A., S.J., A.A.'s mother, Padelford, and Caldwell. The police also referred A.A. and S.J. to the Midwest Children's Resource Center (MCRC) to be interviewed by a nurse trained to evaluate children for abuse.

Leah Mickschl, a registered nurse at MCRC, interviewed A.A. and S.J on videotape individually. A.A. told Mickschl that a man at her grandmother's apartment had pulled down her underwear and "kissed her crotch." Mickschl showed A.A. a

diagram of a woman's body and asked her to point to where the man "kissed" her. A.A. pointed to the vagina. S.J. told Mickschl that "T.C. kissed [A.A.] on the crotch."

The state charged Caldwell with first- and second-degree criminal sexual conduct. A jury found Caldwell guilty of both charges. The district court sentenced him to 234 months in prison, the presumptive sentence based on the crime and Caldwell's criminal history. Caldwell appeals.

D E C I S I O N

Terry Caldwell contends that his convictions must be reversed for five reasons. He argues that the district court abused its discretion by refusing to allow him to inquire into A.A.'s potential alternative source of knowledge of sexual activity. He argues that the district court erred by allowing the state to introduce three prior felony convictions to impeach his testimony. He contends that the prosecutor committed prejudicial misconduct during closing argument by asserting that, to acquit Caldwell, the jury must believe that A.A. is a liar. He also maintains that the district court committed reversible error by allowing the jury to review A.A.'s recorded interview twice during its deliberations. And finally, Caldwell argues that if we do not reverse his conviction of first-degree criminal sexual conduct, we must vacate his conviction of second-degree criminal sexual conduct because it is a lesser-included offense. Only his last argument persuades us.

I

Caldwell asserts that the district court abused its discretion by not allowing him to inquire regarding A.A.'s older sister's prior sexual abuse to show that A.A. potentially

had an alternative source of sexual knowledge. A district court's decision to exclude evidence that a complainant in a criminal sexual conduct case had an alternative source of knowledge of sexual matters is reviewed for an abuse of discretion. *State v. Kroshus*, 447 N.W.2d 203, 204–05 (Minn. App. 1989), *review denied* (Minn. Dec. 20, 1989). Absent a clear abuse of discretion, this court will not reverse a district court's evidentiary ruling. *Id*. at 204.

Caldwell's argument on appeal is very different from the argument that his trial counsel presented to the district court regarding the disputed evidence. In his opening statement at trial, Caldwell's attorney said, "The evidence will show that this [sexual abuse] has happened in this family before. The evidence will show that an older sister—". Before Caldwell's attorney could finish his statement, the prosecutor objected and the parties had an off-the-record discussion with the judge. Caldwell's attorney then finished his opening statement without returning to the issue.

Later, outside the jury's presence, Caldwell's counsel sought to "make a record as a result of [the] bench conference" and the district court's "rulings on the application of Rape Shields in this case." The following colloquy occurred between the district court and the attorneys:

> Caldwell's attorney: My reading of the [Rape Shield] statute clearly applies to the victim in this case. I understand that the Prosecution's argument is relevance to the case at hand and I would argue—we would argue that the situation involving [S.A.], the older sister of [A.A.], her prior abuse at the hands of her father, which is alleged in the police reports by the mom . . . , is relevant in this case due to the fact that [S.A.] and [A.A.] do share a bedroom, they are in close proximity to each other, their relationship has been characterized as close

by mom. I think that that may have in some way affected the testimony, at least that is our argument . . . I know we weren't able to go in that area when those parties were on the stand. I would like to request that we be allowed to when we are in closing, to a very limited degree, because this is a household-affecting event. It happened once in a household and it is alleged for a second time in a household. A household that has been through this before would react differently than a household who has been through it for the first time. I think that is something that the [j]ury should consider in their deliberations.

. . .

Prosecutor: Your Honor, under the Rape Shields statute, it does apply to the victim. But what the Rape Shields statute provides is that . . . any prior sexual abuse [of] the victim is generally not admissible except under certain exceptions that wouldn't apply in this case. This isn't involving the victim, but my argument when we discussed that up at the bench was that that makes it even less relevant here.

What there is, Your Honor, is in the police report there is a couple of sentences that say [the mother] stated "she had a similar incident involving her nine-year-old daughter who was sexually abused by her father when she was three years old." That is what it says. That would have been six years ago. That would have been before our victim was even born. My argument was that the relevance—when it is not even the victim who was previously sexually abused but some sister who was apparently abused as far as we know—we don't have much information—before this victim was even born, that the relevance is even more distant to this case, and it seems to me it would be prejudicial to start talking about other issues of child sexual abuse that don't appear to have any relevance here. That was my concern and it looks to me like the timing was before this child was even born.

The Court: [to Caldwell's attorney] Your brief reply.

Caldwell's attorney: . . . Your Honor, it is not only mentioned in the police report, but it is also mentioned in the diagnostic report from MCRC, which has it in the section under family history. I am assuming that someone from MCRC is going to

> testify to what they have used to come to their conclusion of whether or not anything happened to [A.A.]. And part of what they used was an interview process where the mom did disclose that "[S.A.], nine-year-old, does have a history of being sexually abused by [A.A.]'s father . . . ." It also goes into some other things about the mom which I don't think are relevant here, but that particular paragraph is what the health professionals use in their overall diagnosis of [A.A.].
>
> The Court: And as I previously ruled that this is fairly far afield. I did not know that this incident with [S.A.] occurred prior to the birth of [A.A.], but it is still not relevant to this charge at hand. So, on 4.01, relevance, 4.02, 4.03, I am not going to allow it . . . you are not allowed to go into any inquiries as to prior sexual abuse of [A.A.'s older sister] . . . [i]t is too far afield.

This exchange shows that in the district court, Caldwell's attorney did not argue that the abuse of S.A. was relevant to establish A.A.'s potential alternative source of knowledge, but rather that S.A.'s abuse was somehow relevant because "[a] household that has been through this before would react differently than a household who has been through it for the first time . . . [and] that is something the jury should consider."

Evidence must be relevant to be admissible. Minn. R. Evid. 402. Evidence is relevant if it tends to make the existence of a fact that is of consequence more probable or less probable than it would be without that evidence. Minn. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues, or misleading the jury. Minn. R. Evid. 403. Based on the argument at trial, the district court did not abuse its discretion by deciding that any inquiry about S.A.'s abuse was not relevant.

Caldwell contends that the district court made no rule-403 determination regarding undue prejudice, but the record suggests otherwise. The district court stated, "on 4.01, relevance, 4.02, 4.03, I am not going to allow . . . inquiries as to prior abuse." The district court's reference to rule 403 indicates that it determined that any probative value of S.A.'s prior abuse was outweighed by its prejudicial effect or that the evidence could be confusing or misleading to the jury. *See* Minn. R. Evid. 403. Caldwell's relevancy argument at trial was insufficient to require the district court to accept evidence of S.A.'s prior abuse.

On appeal, Caldwell morphs his relevancy argument to assert that the prior abuse "was relevant because it may have established that A.A. had a source of knowledge of sexual activities from an incident other than the alleged offense." The supreme court has noted that 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." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). But the court also noted that "as in ruling on the admission of other kinds of evidence, the trial court ought to balance the probative value of the evidence against its potential for causing unfair prejudice." *Id.* Even if we construe the record to conclude that Caldwell argued that S.A.'s prior abuse should be admitted to show that A.A. had an alternative source of sexual knowledge, his argument fails because he made no offer of proof establishing that the testimony he was soliciting would establish that theory. S.A.'s alleged abuse might be relevant for the theory if, for example, Caldwell offered to show that S.A. told A.A. the details of her

prior abuse. He did not. Because Caldwell's off-point argument at trial does not preserve the challenge he makes only on appeal, or alternatively because he failed to make an offer of proof in support of his current argument, we reject his claim that the district court abused its discretion by excluding evidence of S.A.'s prior abuse.

We observe also that the alleged error was harmless. Even if we were to find that the district court erred by prohibiting the examination about A.A.'s possible alternative source of knowledge, we would not reverse if the error was harmless beyond a reasonable doubt. *See Kroshus*, 447 N.W.2d at 205 ("If the error is harmless beyond a reasonable doubt, the trial court must be affirmed."). An error is harmless only if this court finds, beyond a reasonable doubt, that "if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury . . . would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). Caldwell contends that the error was not harmless because "there is a reasonable possibility that the verdict might have been more favorable to [Caldwell] had he been allowed to inquire about [A.A.'s] alternative source of knowledge of sexual matters." The contention is not compelling.

The record as a whole, including the strength of the state's case, may be considered in determining whether any error was harmless. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997); *see also Kroshus*, 447 N.W.2d at 205 ("Whether an error is prejudicial depends on the strength of the state's case."). The *Kroshus* court concluded that the error in failing to allow alternative source evidence was harmless because the state's case was strong, consisting of a victim's spontaneous report of sexual abuse and repeated consistent statements describing the events. *Id.* Medical testimony also

indicated that the victim "had experienced penile-vaginal penetration and that her hymen had been broken in a forceful manner." *Id.* Although the medical evidence in our case is lacking, the jury received evidence that A.A. spontaneously reported the sexual abuse as soon as she met her mother after the sleepover. A.A. also repeated the accusations to police officers, to the nurse at MCRC, and at trial. Additionally, S.J. testified corroboratively and he also had told the MCRC nurse that "T.C. kissed [A.A.] on the crotch." S.J.'s recorded interview was admitted at trial and viewed by the jury. Even if Caldwell preserved the objection and even if the district court erred by excluding inquiries regarding S.A.'s prior sexual abuse, reversal is not warranted because the state's case was sufficiently strong to overcome the error.

II

Caldwell next contends that the district court abused its discretion by allowing the state to introduce three of his prior felony convictions to impeach his testimony. Specifically, he argues that "analysis of the *Jones* factors demonstrates that any probative value of the prior convictions evidence was substantially outweighed by the prejudicial effect." He also asserts that the "whole person" rationale is an improper standard because it functions "as a rubber stamp for admissibility." District court rulings on the use of prior convictions to impeach a defendant's testimony are reviewed for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Caldwell's argument does not meet that standard.

Before trial, the state moved to admit three of Caldwell's prior felony convictions as impeachment evidence, if Caldwell chose to testify. The convictions include a 2003

felony domestic assault, a 2003 felony DWI, and a 1998 felony controlled substance offense. The district court granted the state's motion, explaining that credibility would be a key issue and "the jury should be entitled to see the entire person" if Caldwell chose to testify.

There are limits to a party's ability to use a prior criminal conviction to impeach a witness's testimony:

> **(a) General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Minn. R. Evid. 609(a). The district court accurately observed that Caldwell's prior felonies do not directly involve dishonesty or false statement. But all the crimes were punishable by imprisonment exceeding one year. The only question remaining is whether the probative value of admitting Caldwell's prior convictions outweighs its prejudicial effect.

The supreme court instructed that the factors from *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn. 1978), should be applied toward that determination. *Ihnot*, 575 N.W.2d at 586. The *Jones* factors include:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of

> defendant's testimony, and (5) the centrality of the credibility issue.

Id. (quoting *Jones*, 271 N.W.2d at 538). The district court conducted that analysis, and our review of the *Jones* factors shows that the district court did not abuse its discretion by admitting Caldwell's prior convictions into evidence.

We are not convinced by Caldwell's contention that "the impeachment value of [his] prior convictions was minimal, at best." The Minnesota Supreme Court has stated that "impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (quotation omitted) (internal quotation marks omitted). The *Gassler* court also noted that "the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value." *Id*. The "whole person" rationale therefore indicates that the prior convictions have substantial impeachment value under the first *Jones* factor.

Caldwell's convictions are not "stale" because, at the time of Caldwell's trial, all the offenses had occurred within the previous ten years. *See* Minn. R. Evid. 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction."). Time had not eroded the impeachment value under the second *Jones* factor.

Caldwell's past convictions bear no similarity to his charged offense of criminal sexual conduct. Because the crimes are dissimilar, the risk of potential prejudice is diminished because there is no chance that the jury will use his past convictions

substantively rather than for impeachment. *See Gassler*, 505 N.W.2d at 67 ("Obviously, if the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively."). The third *Jones* factor does not suggest undue prejudice.

Considering the fourth *Jones* factor, Caldwell's testimony was important to his defense because he denied sexually abusing A.A. He contends that his testimony was the only way that the jury could hear his side of the story because he made no postarrest statement to the police. He therefore contends that "[t]his factor weighs heavily in favor of excluding the prior convictions evidence." We agree that this one factor weighs in favor of a finding of prejudice. But all the other *Jones* factors weigh in favor of admissibility.

As the district court correctly observed, the fifth factor, regarding the centrality of Caldwell's credibility, weighs in favor of admitting evidence of his prior convictions. The district court stated that "Defendant's story wouldn't have to be told, but if it is told, the issue becomes one of credibility." When credibility is a central issue in a case, there is a greater need for impeachment testimony. *State v. Lloyd*, 345 N.W.2d 240, 246–47 (Minn. 1984). In *Lloyd*, the supreme court observed that even if a defendant's prior convictions have less bearing on credibility than crimes involving untruthful conduct, Rule 609 "clearly sanctions the use of felonies which are not directly related to truth or falsity for purposes of impeachment, and thus necessarily recognizes that a prior conviction, though not specifically involving veracity, is nevertheless probative of credibility." *Id*. (quotation omitted). It further explained that the principle of Rule 609 is

"that impeachment by a prior conviction assists the jury to judge better the credibility of a witness by affording it the opportunity to view that person as a whole." *Id.* at 247.

Our review of the *Jones* factors convinces us that the district court did not abuse its discretion by concluding that the probative value of admitting Caldwell's prior convictions for impeachment purposes outweighed the prejudicial effect.

Caldwell's argument that the "whole person" rationale is an improper justification for admissibility of his past convictions fails. It is not the role of this court to overturn established supreme court precedent. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998). As Caldwell acknowledges, the supreme court has used the "whole person" rationale in reviewing a district court's decision to admit prior convictions under Rule 609. *See, e.g.*, *Gassler*, 505 N.W.2d at 67 ("[I]mpeachment by prior crime aids the jury by allowing it to see the whole person." (quotation omitted) (internal quotation marks omitted)). We reject Caldwell's argument.

III

Caldwell asserts that the prosecutor committed misconduct because the state's closing argument "revolved around a single theme: in order to acquit [Caldwell], the jury would have to believe that [A.A.] had lied in her initial accusations and again in her trial testimony." He points to several credibility-related remarks that the prosecutor made during closing argument, including asking the jury a string of rhetorical questions: "Putting it another way, do you think that [A.A.] is making this all up? Do you think that five-year-old is just fooling everybody? Do you think that this five-year-old is sophisticated enough to pull off some elaborate lie about this?" The prosecutor then told

the jury that "if you are going to find it didn't happen, then you are deciding that five-year-old girl got up here and lied." At least three other times in his closing argument, the prosecutor emphasized that if the jury found that Caldwell was not guilty, it essentially would be concluding that A.A. lied under oath. Although Caldwell did not object to any of these statements at trial, he now contends that the statements constitute prosecutorial misconduct because "[t]he State's argument shifted the jury's focus away from the proper inquiry—whether the State had proven the charged offenses beyond a reasonable doubt—and improperly framed the issue to be determined as whether [A.A.] had lied." The contention fails.

Prosecutorial misconduct that is not objected to at trial will merit reversal only when it constitutes plain error that affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). If the defendant establishes that the misconduct was plain error, the state bears the burden of proving that the error did not affect his substantial rights. *Id*. at 300. An error is plain if it is clear or obvious, such as a violation of law, rule, or standard of conduct. *Id*. at 302. When the purported misconduct occurs during closing argument, the argument must be evaluated as a whole. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). An improper remark must have "played a substantial part in influencing the jury to convict the defendant." *Id*.

Caldwell has not established that the prosecutor plainly erred in his closing argument. Caldwell cites to *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005), for the proposition that a prosecutor generally commits misconduct when he poses "were they lying" questions about other witnesses to a defendant on cross-examination. The

prosecutor did not ask Caldwell this sort of question. Caldwell maintains that "the jury must determine that the witness whose testimony contradicts the defendant's testimony is lying, instead the prosecutor explicitly advanced that proposition throughout his entire closing argument." Caldwell cites no authority holding that a prosecutor commits plain error by stating the logical proposition that if the jury decides that a defendant is not guilty, it is essentially finding that the alleged victim was incredible. He has not shown that the prosecutor plainly erred.

A review of the entire closing argument vindicates the prosecutor in the face of Caldwell's claim of misconduct. A prosecutor may argue fair inferences that may be drawn from the evidence produced at trial. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). The prosecutor's closing argument summed up the evidence and reasonably narrowed the issue to credibility. Because A.A. testified that Caldwell had sexually abused her, and Caldwell testified that he did not, the verdict would depend on the jury's finding of credibility. As Caldwell's brief acknowledges, "Ultimately, this case was about witness credibility . . . ; the case turned on whether the jury believed A.A.'s allegations that [Caldwell] sexually touched her."

We conclude that the prosecutor did not plainly err by pointing out that finding Caldwell not guilty meant that A.A. was lying. Because Caldwell has not shown that the prosecutor committed plain error, we do not consider whether the state has proven that the alleged misconduct did not affect Caldwell's substantial rights.

IV

Caldwell argues that the district court "committed reversible error by allowing the jury to review twice during its deliberations [A.A.]'s videotaped testimonial statement." We address this argument with some background about what happened after the jury retired to deliberate.

When the jury retired to deliberate, it took with it all the exhibits that were admitted into evidence, including the DVD recordings of A.A.'s and S.J's interviews with the MCRC nurse. The jury had viewed the DVDs at trial, but it lacked equipment to view them in the jury room. On the first afternoon of deliberations, the jury sent the judge a note that read, "The jury would like equipment to view the DVDs." The judge conferred with the attorneys before responding. Caldwell's attorney objected to the "re-showing" of the interviews, contending that the videos were "extremely prejudicial" to Caldwell and that it would be duplicative to show the jury again. The district court addressed the argument in this way:

> The DVDs, Exhibit 1 and 2 were properly received into evidence and they are part of the record. And since the playback equipment is not going back into the jury deliberation room, so that the jurors could look at the videos outside the presence of the Defendant, the Court is going to allow the Jury to review the DVDs in the presence of the Defendant in open court with Counsel present. The transcripts [of the interviews], as both Counsel are aware, are not part of the record, so the transcripts obviously do not go back to the jury deliberation room in an attempt to obviate the necessity of having them come in here and view the DVDs . . . The Court concludes that the proper way to have the jury review the DVDs is in open court in the presence of the Defendant. That is what is going to happen.

The district court then summoned the jury and played both the DVDs.

The next morning, the jury sent the judge another note that read: "Request. The jury would like to review the DVD of [A.A.]'s interview of MCRC again. [A]lso can we deliberate while watching the DVD? Can we run the equipment ourselves?" Again, the district court read the note to the attorneys and again Caldwell's attorney objected, arguing that granting the request would be "extremely prejudicial." The district court stated, "Minnesota Rules of Criminal Procedure, Rule 26.03, subdivision 19(1) and (2) specifically provide for this proceeding. . . . [Y]our objection is overruled." The jury then returned to the courtroom and again viewed A.A.'s recorded interview. Caldwell argues that he is entitled to a new trial because the district court granted the jury's requests without properly analyzing whether he would be unduly prejudiced.

"The decision to grant a jury's request to review evidence is within the discretion of the district court, and [appellate courts] will not overturn it absent an abuse of that discretion." *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008). The *Everson* court faced a very similar challenge from a trial in which the district court had granted a jury's request to review audio recordings that were submitted into evidence at trial. *Id*. at 344–45. The supreme court directed:

> When a jury makes a request such as this, the court "should" consider three factors: (i) whether the material will aid the jury in proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury.

Id. at 345 (citations omitted). But in *Everson*, the district court's on-the-record analysis did not reflect whether the district court "explicitly considered whether [the defendant] would be 'unduly prejudiced' by the jury's hearing" of the recorded statement a second time. *Id*. at 346. The supreme court noted that "[a]bsence of this analysis from the record makes appellate review difficult." *Id*. But the difficulty did not prevent the supreme court from resolving the appeal because the court noted, "[e]ven if the district court erred . . . that error would be subject to harmless error analysis." *Id*.

Similar to *Everson*, Caldwell contends that before granting the request the district court failed to consider whether he would be unduly prejudiced by the jury reviewing the recording. Also similar to *Everson*, because the district court did not make an on-the-record analysis of whether Caldwell would be unduly prejudiced, appellate review is difficult. We will therefore approach the issue as the *Everson* court did.

In this context, an error is harmless if "it is extremely unlikely that review of the [recordings] caused the jury to convict where it otherwise would not have done so." *Id*. at 347 (internal quotation marks omitted). In *Everson*, as well as *State v. Kraushaar*, 470 N.W.2d 509 (Minn. 1991), the supreme court held that replaying for the jury a recording that had been admitted into evidence was harmless because it "merely allowed the jury to rehear what it had already heard." *Everson*, 749 N.W.2d at 346 (quoting *Kraushaar*, 470 N.W.2d at 516, and reaching the same conclusion). Similarly, in this case, the jury had already seen and heard the recording during the trial. And the substance of the recording was very similar to A.A.'s trial testimony. During trial, A.A. testified that a man at her grandmother's apartment named "T.C." stayed awake with her and her brother for the

entire night and that T.C. "kissed [her] on the crotch." On the recording, A.A. also stated that the man at her grandmother's apartment "kissed [her] on the crotch." It is understandable that the jury wanted to see the recording again because it first viewed the recording on the second day of trial, which was on a Friday, and the jury did not begin to deliberate until after lunch the following Monday. Merely allowing the jury to see and hear what it had already seen and heard during the trial is harmless error. *See Everson*, 749 N.W.2d at 346; *Kraushaar*, 470 N.W.2d at 516.

We also note that the district court used the proper procedure when it allowed the jury to view the recordings. It returned the jury to court with the defendant and the attorneys present. Minn. R. Crim. P. 26.03, subd. 19(2). Caldwell is not entitled to a new trial for this purported error, because it was harmless.

V

Caldwell finally argues that the district court erred "by formally adjudicating [Caldwell] guilty of second-degree criminal sexual conduct because that offense is included in [his] first-degree criminal sexual conduct conviction." He is correct. A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2006). An included offense is a "lesser degree of the same crime" or a "crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(1), (4). Because second-degree criminal sexual conduct is a lesser-degree of first-degree criminal sexual conduct, it was improper to convict Caldwell of both crimes.

There is no dispute on this issue. The state concedes that the district court should not have adjudicated Caldwell on the second-degree charge and that "[t]he formal

adjudication of guilt for the lesser charge should be vacated." We therefore reverse on this issue only and remand for the district court to vacate Caldwell's conviction of second-degree criminal sexual conduct.

Affirmed in part, reversed in part, and remanded.