STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2345

State of Minnesota,
Respondent,

vs.

Ricky Lee Wehmeyer,
Appellant.

Filed December 8, 2009
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Jackson County District Court
File No. 32-CR-06-304

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Robert O'Connor, Jackson County Attorney, 405 Fourth Street, P.O. Box 177, Jackson, Minnesota 56143 (for respondent)

Marie Wolf, Interim Chief Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

HUDSON, Judge

On appeal from his conviction of second-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to support his conviction; (2) the

district court abused its discretion by admitting *Spreigl* evidence; (3) the district court erred by not ordering a new trial for discovery violations; and (4) his life sentence is invalid because (a) the state failed to give proper notice, (b) he was not charged by indictment, (c) the district court miscalculated the mandatory minimum term of imprisonment, and (d) his counsel failed to inform him of the possibility of a life sentence. In his pro se supplemental brief, appellant raises additional constitutional challenges. We affirm on all issues with the exception of the calculation of the mandatory minimum term of imprisonment. On that issue, because the district court imposed a mandatory minimum term of imprisonment longer than the statutory maximum allowed, we reverse and remand.

FACTS

Appellant Ricky Lee Wehmeyer was charged by complaint with two counts of second-degree criminal sexual conduct against T.R., a minor child, in violation of Minn. Stat. § 609.343, subd. 1(a) (2004) (sexual contact with a victim under 13 years of age by an offender more than 36 months older than the victim), and Minn. Stat. § 609.343, subd. 1(e)(i) (2004) (force or coercion to accomplish sexual contact and personal injury to victim). Prior to trial, the state voluntarily dismissed count two, involving force or coercion.

In April 2006, Lakefield police investigated a report that six-year-old T.R. told her mother that appellant had "touched [her] privates." Appellant had previously lived with T.R. and her parents and had a relationship with her mother. T.R.'s mother reported that, according to T.R., while she was at family acquaintance K.H.'s house, T.R. approached

appellant while he was working on a computer. T.R. said that appellant lifted her onto his lap and began inappropriately touching her. A Lakefield police officer attempted to ask T.R. about the incident, but T.R. stopped talking, buried her head in her knees, covered her head and began to cry.

The officer referred the case to an investigating officer, who in turn consulted a county child-protection social worker. The social worker interviewed T.R. in a "soft room" at the Lakefield police station the next day. A tape recording of the interview was played for the jury at trial. During the interview, T.R. indicated that she and appellant were at K.H.'s house when appellant touched her "bottom" and "private" over her clothes.

Appellant's initial trial ended in a jury deadlock, and the district court declared a mistrial. Appellant was retried shortly thereafter.

At the retrial, the investigating officer testified that he took a statement from K.H.; both parties were surprised to learn of this interview. The officer said that it was possible that the transcript of the interview was in another file because K.H. was involved in another active case. Immediately after his testimony, the officer retrieved the recording and transcript of the interview as requested by defense counsel. Defense counsel received the statement that day after adjournment and did not object on the record to the late discovery. Defense counsel reviewed the statement, spoke with K.H., and decided not to call her as a witness.

T.R. also testified at the retrial. She testified that, when appellant touched her, she was in K.H.'s living room with appellant, her parents, and K.H. T.R. testified that she

was standing next to appellant while he was at the computer and that he touched her "private" over her clothes. T.R. testified that she did not remember all of the details of the incident but that she did remember appellant touching her and that she did not like it.

Over defense objection, the state offered into evidence a portion of appellant's plea transcript from a previous case in which appellant pleaded guilty to criminal sexual conduct with a different young girl. In that transcript, appellant admitted that in March 1995, he had exposed his penis to a ten-year-old girl and had her touch his penis for his sexual gratification while the two of them were on a walk.

The defense rested without presenting any evidence. The jury found appellant guilty of second-degree criminal sexual conduct. At sentencing, the state informed the defense for the first time that it intended to seek a life sentence. The state had originally sought an upward durational departure under Minn. Stat. § 609.1095, subd. 2 (2004), and accordingly, put in evidence of appellant's prior convictions during the sentencing phase. In addition, the jury found that appellant was over age 18 when he committed the current offense and that he is a danger to public safety. The district court sentenced appellant to a mandatory life sentence, with a minimum term of 360 months.

Appellant's appeal to this court was initially stayed pending his petition for postconviction relief. The district court subsequently denied appellant's petition for postconviction relief, and his appeal was reinstated by this court.

D E C I S I O N

I

Appellant argues that the evidence presented at trial was insufficient to prove that he was guilty of second-degree criminal sexual conduct. Review of a claim of insufficient evidence is "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). This court cannot retry facts but must take the view of the evidence most favorable to the jury verdict and must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *Id.* If the jury could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the state's burden of proof beyond a reasonable doubt, the verdict will not be reversed. *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

The state had the burden of proving beyond a reasonable doubt that appellant engaged in "sexual contact" with T.R. when she was under age 13 and appellant was more than 36 months older. *See* Minn. Stat. § 609.343, subd. 1(a) (2004). "Sexual contact" includes the touching by the actor of the complainant's intimate parts with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(a) (2004). Intimate parts include "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." Minn. Stat. § 609.341, subd. 5 (2004).

Appellant argues that there are "grave doubts" about his guilt that warrant reversal, based on T.R.'s inconsistent statements. But weighing the credibility of a

witness is a function left exclusively to the jury. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "A jury, as the sole judge of credibility, is free to accept part and reject part of a witness's testimony." *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977).

Here, T.R. gave varying accounts of what happened to her. In her statement to police, T.R.'s mother said that T.R. told her that appellant had put T.R. on his lap and then touched her "private." But T.R. later indicated during the interview with the social worker that appellant had touched her "bottom" and "private" while she was standing next to him. The Minnesota Supreme Court has explained that these types of inconsistencies often occur when witnesses try to reenact events that occur in stressful situations. *State v. Hanson*, 286 Minn. 317, 335, 176 N.W.2d 607, 618 (1970). "They are a sign of the fallibility of human perception—not proof that false testimony was given." *Id.* Although a victim's accounts of a sexual assault may be contradictory or inconsistent, the jury is entitled to believe the victim. *State v. Erickson*, 454 N.W.2d 624, 629 (Minn. App. 1990), *review denied* (Minn. May 23, 1990). Inconsistencies within the state's case will not require reversal of the jury's verdict. *Id.* The jury weighed the credibility of T.R.'s testimony and was free to accept or reject it.

Appellant also argues that a lack of corroborating testimony warrants reversal of the jury verdict. But corroboration by other witnesses is not required; a guilty verdict may be based on the testimony of a single witness. *State v. Burch*, 284 Minn. 300, 313, 170 N.W.2d 543, 552 (Minn. 1969). In a criminal-sexual-conduct case, the testimony of the victim need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2004); *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (holding that although absence of corroboration may

affect determination that evidence was insufficient to support conviction in an *individual* case, it is not constitutionally or statutorily required). T.R.'s testimony alone is sufficient to support appellant's conviction.

II

Appellant next argues that it was error for the district court to admit *Spreigl* evidence of his prior criminal-sexual-conduct conviction. A reviewing court will not reverse the district court's admission of evidence of other crimes or bad acts absent a clear abuse of discretion. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). To prevail, an appellant must show error and prejudice resulting from that error. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

As a general rule, evidence of a defendant's other crimes or bad acts is not admissible to prove the defendant's character for the purpose of showing that he or she acted in conformity with that character trait. Minn. R. Evid. 404(b); *Kennedy*, 585 N.W.2d at 389. But such evidence may be admitted for the limited purpose of showing motive, intent, absence of accident or mistake, identity, or a common scheme or plan. Minn. R. Evid. 404(b).

In a criminal prosecution, other-crimes evidence is not admissible unless (1) the state gives notice that it intends to use the evidence; (2) the state clearly indicates what the evidence will be offered to prove; (3) clear and convincing evidence proves that the defendant participated in the other offense; (4) the evidence is relevant and material to the state's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. *Id.*; *State v. Ness*, 707 N.W.2d 676, 686 (Minn.

2006). Appellant disputes whether the evidence was relevant and material and whether the probative value of the evidence was outweighed by the risk of unfair prejudice.

Relevant and material

When determining whether *Spreigl* evidence is relevant and material, "the trial court should consider the issues in the case, the need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place or modus operandi." *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984). This test has been applied flexibly, "notwithstanding a lack of closeness in time or place if the relevance of the evidence is otherwise clear." *Kennedy*, 585 N.W.2d at 390; *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). When a defendant contends that the charges against him are a fabrication, *Spreigl* evidence may be used to rebut that contention as long as the district court is satisfied that the evidence is sufficiently relevant to the current charge. *State v. Wermerskirchen*, 497 N.W.2d 235, 240–41 (Minn. 1993). But the mere fact that the prior crime is of the same generic type as the crime charged is usually not sufficient. *State v. Cogshell*, 538 N.W.2d 120, 123 (Minn. 1995). Generally, as the time span increases, similarities in terms of modus operandi should also increase. *State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005).

The *Spreigl* offense admitted here occurred in March 1995, more than ten years before the offense in this case. In the 1995 case, appellant went for a walk with a ten-year-old girl, exposed his penis to her under a bridge near Northfield, and had her touch his penis for his sexual gratification. The prior offense is not closely related in temporal

terms or in terms of where the events occurred. But the critical issue is relevance, not the temporal relationship. *Bolte*, 530 N.W.2d at 198.

Here, appellant was accused of touching T.R. over her clothing while they were in a room with other people. In that respect, the conduct is dissimilar to appellant's 1995 conviction. But there are also striking similarities between the offenses. As the district court noted, in both cases the victim was a young girl with whom appellant engaged in sexual contact. We also note that in each case appellant had a romantic relationship with the victim's mother, and appellant became acquainted with the victim through his association with her mother. In concluding that the *Spreigl* evidence was admissible, the district court noted that the defendant has not admitted the acts charged and would likely deny the charges in the instant case if he testifies, and the prior conviction would be very useful to the state to show motive, intent, lack of mistake or accident, knowledge, preparation, or plan. On this record, it was not a clear abuse of discretion for the district court to find that the evidence was relevant and material.

Probative value versus prejudicial effect

When balancing the probative value of *Spreigl* evidence against its potential for unfair prejudice, the district court must consider how necessary the evidence is to the state's case. *State v. Berry*, 484 N.W.2d 14, 17 (Minn. 1992). Only if other evidence is weak or inadequate, and the *Spreigl* evidence is needed to support the state's burden of proof, should it be admitted. *Id.* The district court should consider the need for the evidence as an important factor in weighing the probative value against unfair prejudice.

Bolte, 530 N.W.2d at 197, n.2. The district court is generally in a better position than the appellate court to evaluate the need for and reasonableness of *Spreigl* evidence. *Id.*

In balancing the probative value and prejudicial effects, the district court noted that appellant would most likely deny the charges against him if he testified and, thus, the *Spreigl* conviction would be quite probative for the state in that it would show proof of intent or absence of mistake or accident. The district court's findings in this regard are supported by the fact that the state's case consisted primarily of T.R.'s testimony, which was not consistent, and the fact that appellant claimed that T.R.'s testimony was fabricated. Thus, the *Spreigl* evidence helped show that the charge was not fabricated and that the sexual contact was intentional. Finally, the district court read a cautionary instruction three times to the jury: once before the evidence was admitted, again as part of the final jury instructions, and, finally, in response to a question from the jury. The instruction, patterned after the model jury instructions in relation to testimony about other crimes or occurrences, protected against the jury's improper use of *Spreigl* evidence. *See State v. Lynch*, 590 N.W.2d 75, 81 (Minn. 1999), 10 Minnesota Practice, CRIMJIG 2.01, 3.16 (2006). Therefore, the district court did not abuse its discretion by admitting the *Spreigl* evidence.

III

At trial, the investigating officer revealed for the first time that he took a statement from K.H. Appellant argued to the postconviction court that the late disclosure of this statement violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and Minn. R. Crim. P. 9.01. The postconviction court agreed that the late disclosure was a discovery

violation but denied relief because appellant's defense was not prejudiced. Appellant reiterates his arguments here.

Under rule 9.01, the state must disclose before the omnibus hearing any material or information within the prosecuting attorney's control or possession that tends to negate or reduce the guilt of the accused for the offense charged, including information in the possession or control of police officers who have participated in the investigation and have reported to the prosecutor's office. Minn. R. Crim. P. 9.01, subds. 1(6), 1(8).

We first note that defense counsel did not object to the late discovery of K.H.'s statement during trial. A defendant who fails to object at trial generally forfeits his right to object on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But a defendant may obtain appellate review and relief from plain errors affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law. *Id.* Substantial rights are affected if the error was prejudicial and affected the outcome of the case. *Id.* at 741. Thus, this court will grant relief only if it was plain error for the district court not to *sua sponte* order a new trial based on the late discovery.

The investigating officer interviewed K.H. on March 1, 2007. During that interview, K.H. told the officer that in August or September 2005 while appellant was playing computer solitaire in her living room, T.R. crawled into appellant's lap with his assistance. K.H. saw appellant place his arm around T.R. and hold on to her hand and knee to steady her. K.H. said that she was in the room with appellant the entire time that T.R. was there and that she did not see appellant inappropriately touch T.R. The officer

did not inform the prosecutor of his interview and inadvertently filed the interview transcript in a separate child-protection file. Although the parties were unaware of this interview, K.H. was subpoenaed by defense counsel in case her testimony was needed to provide foundation for the introduction of photographs of K.H.'s living room. When testifying at trial, the officer revealed that he had interviewed K.H. Because the statement was in the officer's control and it tended to negate appellant's guilt, the late disclosure of K.H.'s statement violated Minn. R. Crim. P. 9.01.

When determining sanctions for discovery violations, the court considers (1) the reason the disclosure was not made, (2) the extent of prejudice to the opposing party, (3) the feasibility of rectifying that prejudice with a continuance, and (4) any other relevant factors. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Whether to impose sanctions for a discovery violation is a question particularly suited to the judgment and discretion of the trial court, which is in the best position to determine whether any harm has resulted and the extent to which that harm can be eliminated or otherwise alleviated. *Id.* at 373. Prejudice resulting from a discovery delay is insufficient to justify a new trial when the delay was inadvertent and a continuance was not requested. *State v. Morgan*, 296 N.W.2d 397, 403 (Minn. 1980); *State v. Pietraszewski*, 283 N.W.2d 887, 891 (Minn. 1979). It is uncontested that the nondisclosure here was inadvertent and that defense counsel did not ask for a continuance. Therefore, the district court did not commit plain error by failing to grant a new trial based on the discovery violation.

Appellant further argues that the late discovery violated due process because the evidence was material and favorable to appellant. *See Brady*, 373 U.S. at 87, 83 S. Ct. at 1196–97; *Woodruff v. State*, 608 N.W.2d 881, 885 (Minn. 2000). Evidence is material when there is a reasonable probability that the results of the trial would have been different had it been disclosed. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). To establish a *Brady* violation, appellant must show that the evidence at issue (1) is favorable to him because it is exculpatory or impeaching, (2) was inadvertently or willfully suppressed by the state, and (3) resulted in prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999).

As the postconviction court noted, K.H.'s statement corroborates T.R.'s statement in many ways, but it is also exculpatory and impeaches T.R.'s testimony because K.H. stated that she did not see appellant touch T.R. inappropriately. Nevertheless, the postconviction court determined that appellant was not prejudiced by the late disclosure because the officer produced K.H.'s statement to counsel the same day it was disclosed. Defense counsel reviewed it and spoke to K.H. that evening. At the postconviction hearing, defense counsel stated that he was uncertain as to whether K.H. would provide helpful testimony because of her hostility. Accordingly, he chose not to call her as a witness. Based on this record, the postconviction court concluded that "experienced trial counsel chose not to risk [appellant's] defense by calling a hostile witness who might, or might not, testify consistent with her prior statement" and that "[t]he decision not to call [K.H.] was a strategic decision and was not significantly impacted by the disclosure

delay." We agree with the postconviction court's determination that appellant was not entitled to relief under *Brady*.

IV

Appellant raises several challenges to his sentencing, which we address in turn.

Sufficient notice of a life sentence

Appellant argues that his rights to due process and notice of the accusation against him under the United States and the Minnesota constitutions were violated because the state failed to adequately inform appellant of its intention to seek a life sentence until the sentencing phase of trial.

The state must inform a defendant "of the nature and cause of the accusation." U.S. Const. amends. VI, XIV. "[T]he purpose of the notice requirement is to allow the defendant to properly prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). In *McCollum v. State*, 640 N.W.2d 610, 618–19 (Minn. 2002), the Minnesota Supreme Court held that due process does not require a reference to the sentencing statute in the charging instrument. Because the charging instrument in *McCollum* informed the defendant of the charges against him, he had fair notice that he faced life in prison even without reference to the sentencing statute. *McCollum*, 640 N.W.2d at 618. The court determined that the potential sentence was readily ascertainable because the defendant could simply check the sentencing statutes concerning the charged crime. *Id.*

In this case, neither statute nor rule requires a reference in the charging instrument to the statute governing appellant's sentence. *See* Minn. Stat. § 609.343; Minn. R. Crim.

P. 17.02. The complaint clearly indicated that appellant was being charged under Minn. Stat. § 609.343. Subdivision 2 of that section makes an explicit reference to section 609.3455 as a potential sentencing statute. Minn. Stat. § 609.343, subd. 2 (Supp. 2005). Moreover, section 609.3455 requires the district court to impose a mandatory life sentence for a conviction under section 609.343 with two previous sex-offense convictions. Minn. Stat. § 609.3455, subd. 4 (Supp. 2005). We conclude that appellant's due process rights were not violated because the complaint informed appellant of the statutes he was being charged under, and those statutes gave him sufficient notice of his potential life sentence.

Requirement of proceeding by indictment

Appellant argues that because his offense is punishable by a life sentence based on the sentencing enhancement, his sentence cannot be upheld because he was not charged by indictment. In Minnesota, a grand jury indictment is required for offenses punishable by life imprisonment. Minn. R. Crim. P. 17.01; *State v Ronquist*, 600 N.W.2d 444, 448 (Minn. 1999). In *Ronquist*, the Minnesota Supreme Court affirmed an enhanced life sentence on a conviction of attempted first-degree criminal sexual conduct when the defendant was not charged by indictment. 600 N.W.2d at 450. The court ruled that because the sentencing enhancement provision of the repeat-sex-offender statute constituted sentencing considerations that did not need to be proved like elements of the offense at trial, the charge did not need to be prosecuted by indictment. *Id.* In that case, as here, the sentencing enhancement factor was a prior conviction.

Appellant argues that *Ronquist* is inapposite based on this court's recent decision in *State v. DeWalt*, 757 N.W.2d 282 (Minn. App. 2008). In *DeWalt*, this court noted that any fact that increases punishment beyond that prescribed by statute must be tried by a jury and proved beyond a reasonable doubt because certain sentencing factors are the "functional equivalent of an element" of the crime. 757 N.W.2d at 288–89 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) (quotation omitted)). In *DeWalt*, the sentence enhancement was based on the finding of a "heinous element" rather than a previous conviction. 757 N.W.2d at 289. The court distinguished *Ronquist* and reasoned that since the enhancement factor in *DeWalt* could be considered an element of the offense to be proved to the jury, an indictment was required. *Id.*

In our view, *Ronquist* controls the outcome here. Appellant's sentence was enhanced to life imprisonment based on his two previous sex-offense convictions. The previous convictions only became relevant once the elements of the instant offense were proved beyond a reasonable doubt and appellant was convicted. *See Ronquist*, 600 N.W.2d at 450. Thus, appellant's previous convictions are not considered an element of the offense and did not need to be proved to a jury. *See generally State v. Outlaw*, 748 N.W.2d 349, 354 (Minn. App. 2008) (explaining scope of *Apprendi* "prior conviction" exception), *review denied* (Minn. July 15, 2008). Because the offense charged does not by itself carry a life sentence, and because the enhancement factor allowing the imposition of a life sentence is not considered an element of the offense that needs to be

proved to a jury under *Blakely*, appellant's offense did not require charging by indictment under rule 17.01.

Miscalculation of the minimum term of imprisonment

Appellant argues that even if his life sentence is appropriate, the mandatory minimum term of imprisonment was incorrectly calculated and must be reduced. We agree.

Defendants convicted under Minn. Stat § 609.3455, subd. 4, are eligible for supervised release after they have served the minimum term of imprisonment specified by the court in its sentence. *State v. Hodges*, 770 N.W.2d 515, 518 (Minn. 2009). The minimum term under Minn. Stat. § 609.3455, subd. 4, is determined by the court at the time of sentencing. Minn. Stat. § 609.3455, subd. 5 (Supp. 2005). The court determines the minimum term "based on the sentencing guidelines, or any applicable mandatory minimum sentence, that must be served before the offender may be considered for supervised release." *Id.* The phrase "any applicable mandatory minimum sentence" in section 609.3455 refers to the mandatory minimum sentences found in Minn. Stat. § 609.342, subd. 2, and Minn. Stat. § 609.343, subd. 2, which are predicate offenses for purposes of Minn. Stat. § 609.3455, subds. 3 and 4. *Hodges*, 770 N.W.2d at 520. For the other predicate offenses that do not have presumptive minimum sentences, the court looks to the sentencing guidelines. *Id.* at 520–21. The district court must set "a minimum term of imprisonment using the procedures that would have been used to sentence the defendant in the absence of the mandatory life sentence found in Minn. Stat.

§ 609.3455, subd. 3 and 4—that is, by reference to any applicable mandatory minimum sentence or the sentencing guidelines." *Id.* at 521.[1]

Here, the underlying crime is second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a). Section 609.343 contains a mandatory minimum sentence provision but, significantly, it does not apply to subdivision 1(a). Minn. Stat. § 609.343, subd. 2(b). Therefore, the proper procedure for determining appellant's minimum term of imprisonment is to follow the same procedure a district court would use under the sentencing guidelines in the absence of a mandatory life sentence. *See Hodges*, 770 N.W.2d at 521.

Here, the district court imposed a minimum sentence of 360 months, presumably based on the sentencing worksheet.[2] But under the proper 2005 sentencing guidelines, the presumptive sentence for second-degree criminal sexual conduct with a criminal history score of 6 or more is 57 months with a presumptive range of 49 to 68 months. Minn. Sent. Guidelines, § IV (2005). Thus, the minimum sentence imposed here is an upward departure.

A district court's decision to depart from a presumptive sentence is reviewed for an abuse of discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009). Reversal is warranted if the reasons given for the departure are inadequate or improper. *Id.*

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[1] Although *Hodges* discusses this framework using the 2006 version of the statute, the calculation method may apply equally to the 2005 version of Minn. Stat. § 609.3455.

[2] It appears that the sentencing worksheet was prepared using the 2008 guidelines for first-degree criminal sexual conduct, which recommend a sentence of up to 360 months. *See* Minn. Sent. Guidelines, § IV (2008).

When a person is convicted under Minn. Stat. § 609.343 and the judge imposes an executed sentence based on a presumptive guidelines sentence, the judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum if the offender was at least 18 at the time of the offense, the court determines that the offender has two or more prior convictions for violent crimes, and the factfinder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2 (Supp. 2005).

At the sentencing phase of the trial, the district court determined that appellant had convictions for two or more qualifying crimes. And the jury found that appellant was at least 18 at the time of the offense and that he was a danger to public safety. These findings are sufficient to impose an upward durational departure under the sentencing guidelines up to the statutory maximum. *See* Minn. Stat. § 609.1095, subd. 2. Notably, the statutory maximum sentence for appellant's conviction is 300 months. Minn. Stat. § 609.343, subd. 2. Therefore, the district court abused its discretion by imposing the 360-month sentence.

Because the mandatory minimum term of imprisonment was incorrectly calculated, we reverse and remand for the district court to recalculate the minimum term of imprisonment and impose a term of imprisonment that does not exceed the statutory maximum term of 300 months.

Ineffective assistance of counsel

Appellant argues that he was deprived of effective assistance of counsel because his attorney did not inform him that he faced a mandatory life sentence. Appellant claims

that, had he known he faced a life sentence, he might have accepted a plea agreement, or his attorney could have made more of an effort to settle the case.

An attorney provides effective representation if he or she "exercise[s] the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances." *Marhoun v. State*, 451 N.W.2d 323, 328 (Minn. 1990) (quotation omitted). To show ineffective assistance of counsel, appellant must affirmatively prove both "that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

There is no support in the record for appellant's claims that he would have accepted a plea or that counsel did not make sufficient effort to settle the case. Appellant has not presented any evidence to show that, but for counsel's error, the result of the proceeding would have been different. Therefore, this claim fails. *See Gates*, 398 N.W.2d at 562 ("[D]efendant must show that counsel's errors actually had an adverse effect in that but for the errors the result of the proceeding probably would have been different.").

V

In his pro se supplemental brief, appellant argues that the state violated his right to a speedy trial under article I, section 6 of the Minnesota Constitution and Minnesota's Uniform Mandatory Disposition of Detainers Act (UMDDA), Minn. Stat. § 629.292

(2006). The existence of a speedy trial violation is a constitutional question subject to de novo review. *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009).

The UMDDA provides that an incarcerated person demanding disposition of a detainer shall be "brought to trial" within six months after receipt of the request for a detainer. Minn. Stat. § 629.292. Appellant's request was received October 12, 2006. His first trial began March 29, 2007, less than six months later. Nevertheless, appellant argues that the UMDDA was violated because there was no final disposition until the verdict at his retrial in August 2007. But the statute provides that appellant must be "brought to trial" within the six-month period. *Id.* Appellant was "brought to trial" on October 12, 2006. Accordingly, the UMDDA was not violated.

When determining whether a constitutional speedy-trial violation has occurred, the following factors are balanced: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his speedy trial right, and (4) whether the defendant was prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 530–32, 92 S. Ct. 2182, 2192–93 (1972); *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999).

Appellant's retrial began approximately ten and one-half months after his UMDDA request and five months after the first trial jury deadlocked on March 30, 2007. On April 7, 2007, the court ordered that the case could be retried, and on May 7, 2007, the court denied appellant's motion for acquittal and granted the state's motion to schedule a new trial. The scheduling order was issued about ten days later, and the second trial took place on August 23 and 24, 2007. The reason for a delay is closely related to the length of the delay, and the weight given the reason for the delay depends

on the circumstances. *State v. Cham*, 680 N.W.2d 121, 125 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). Negligent or administrative reasons for delay are given less weight than deliberate attempts by the state to delay trial. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192; *State v. Huddock*, 408 N.W.2d 218, 200 (Minn. App. 1987). The reasons for the delay here are administrative, and there is no indication of any deliberate attempt by the state to delay the trial. The district court noted that the delay until the retrial was primarily attributable to the jury deadlock in the first trial. Appellant did not demand a speedy trial after the jury deadlocked and the district court determined that the case could be retried. On May 22, 2007, appellant instead filed a motion for dismissal; the motion was heard on June 18, 2007.

Three factors are weighed to determine whether the delay prejudiced the defendant: (1) avoiding oppressive pretrial incarceration, (2) minimizing the defendant's anxiety or concern, and (3) preventing impairment of the defense. *Windish*, 590 N.W.2d at 318. The third factor is most important. *Id.* The district court scheduled appellant's retrial date before the end of the prison sentence he was serving at that time. Accordingly, appellant was not incarcerated pretrial any longer than he already would have been. Appellant alleges that he was prejudiced because he lost the possibility of a change in risk level that was assigned to him while he was in prison. But he does not allege that his defense was impaired or provide any evidence that he experienced any undue anxiety. We conclude that appellant's speedy-trial right was not violated.

VI

In his pro se supplemental brief appellant also alleges that his right to be present at trial, his privilege against self-incrimination, and his equal protection rights were violated. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby*, 547 N.W.2d at 357. Because appellant did not raise these issues to the district court, we decline to consider them here.

Affirmed in part, reversed in part, and remanded.