STATE OF MINNESOTA
IN COURT OF APPEALS
A10-741

State of Minnesota,
Respondent,

vs.

Bruce Roy Tiedemann,
Appellant.

Filed May 23, 2011
Affirmed
Wright, Judge

Olmsted County District Court
File No. 55-CR-08-7342

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

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

WRIGHT, Judge

In this appeal arising from multiple convictions of first- and second-degree criminal sexual conduct, appellant argues that the district court committed reversible

error by admitting evidence of his prior bad acts under Minn. R. Evid. 404(b) and admitting unreliable hearsay. Appellant also challenges his sentence, arguing that it violates appellant's constitutional right to equal protection and it is the result of the state's unlawful manipulation of charges. In addition, appellant argues that the evidence is insufficient to support his convictions. We affirm.

FACTS

On June 11, 2008, between 4:00 p.m. and 4:30 p.m., 15-year-old J.L. walked home from her job in Rochester along a bike path while talking with two friends on her cellular telephone via headphones. As she walked under a highway bridge, a man ran up behind J.L. and held an eight-inch knife against her neck. One of the friends with whom J.L. was speaking heard J.L. scream and heard a man's voice say "don't move or I'll f--king kill you." The telephone call was disconnected about three seconds later.

J.L. did not recognize the assailant but observed that he was a heavy-set white man in his 30s or 40s with dark brown eyes, dark brown bushy eyebrows, and hair on his fingers. The assailant was approximately five feet, nine inches tall; and he wore a sweatshirt, shorts, a stocking cap, and a neck warmer covering his mouth and nose, all of which were navy blue in color. He also was wearing dark tennis shoes. The assailant put his hand over J.L.'s mouth, pushed her against the bridge wall, wrapped his arm around her neck, and choked her with his hand until her nose bled and she became too weak and dizzy to resist physically. J.L. smelled cigarettes on the assailant's hand. As the assailant wrapped J.L.'s headphone cord around her neck and strangled her, he said, "Just shut up, shut up, and I'll stop." He directed her to lie on her stomach and pull down her pants.

She complied. The assailant then unfastened his pants and penetrated J.L.'s vagina with his penis for two or three minutes. The assailant warned J.L. that he would kill her if she did not remain at that location. Then he fled.

J.L. called 911 on her cellular telephone and ran toward nearby residences. En route she encountered two construction workers and told them that she had been raped. One of the construction workers observed dirt on J.L.'s clothes, blood on her face and neck, and a mark below her neck. Rochester Police Officer Sean McCarron arrived at the scene and observed the same. He also observed that the marks on J.L.'s neck were consistent with being strangled by a rope or cord. The police interviewed J.L. at the scene and photographed her injuries before an ambulance transported her to a hospital emergency room. Dr. Mark Mannenbach, a pediatric emergency medicine physician, observed bruising, contusions, and abrasions around J.L.'s neck and broken blood vessels on her face. These injuries were consistent with strangulation using a cord-like object. Dawn Anderson, a sexual-assault nurse examiner, observed scratches and abrasions on J.L.'s abdomen and other extremities.

The police searched the crime scene, where they recovered a headphone cord and J.L.'s backpack and photographed a patterned shoeprint in the mud. Parole and probation agents in the Rochester sex-offender unit advised Rochester Police Investigator Jennifer Bruessel to consider appellant Bruce Roy Tiedemann a suspect based on J.L.'s description of the assailant and the attack. Tiedemann was 32 years old in June 2008. He is white, five feet, eight inches tall, and weighs approximately 210 pounds. He has brown eyes, dark brown bushy eyebrows, and hair on his fingers. He also smokes

cigarettes. During an interview with the police at the law enforcement center, Tiedemann advised that he dropped off his girlfriend at work in Rochester on June 11 at 2:30 p.m., performed errands in Rochester, purchased gas at 3:35 p.m., and drove south from the gas station to McQuillen Field on Marion Road, where he slept in his vehicle until he began his umpire job at 6:15 p.m. Although Officer Eric Boynton advised Tiedemann that he was investigating an assault without specifying that it was a sexual assault, Tiedemann volunteered that he was aware that a sexual assault had occurred near a bike path, and he denied any involvement. Tiedemann provided a DNA sample and permitted the police to photograph the soles of his shoes, along with his hands, face, head, and neck.

Approximately 12 minutes after Tiedemann left the law enforcement center, Investigator Bruessel called Tiedemann's cellular telephone and asked him to return to the law enforcement center. Tiedemann agreed to return and advised Investigator Bruessel that he was approximately 20 minutes away. Tiedemann withdrew money from an automatic teller machine at approximately the time when Investigator Bruessel called him. But Tiedemann did not return to the law enforcement center, and cellular-telephone records and automatic-teller-machine receipts later showed that Tiedemann drove to Owatonna instead.

Tiedemann called his sister and told her that he had "f**ked up." When she asked what he meant, Tiedemann replied, "[O]h, you'll find out." He then said that he would rather kill himself than go back. His sister understood this statement to refer to returning to prison. Tiedemann also told his sister that he left evidence behind, including a condom

with his DNA, and that he had been interrupted. Tiedemann did not return home for several days.

The police obtained and executed search warrants for Tiedemann's residence and his vehicles. They seized a black knit stocking cap, a neck warmer, a pair of knee-length dark blue softball shorts, a dark blue sweatshirt, and a dozen or more eight- to twelve-inch knives. They also seized a pair of black shoes with soles that closely matched the shoeprint that was photographed at the scene of the sexual assault. The police observed stains on the shorts that lab tests later identified as Tiedemann's semen. The police also obtained a surveillance video from June 11 that shows Tiedemann leaving a gas station at 3:39 p.m. and driving in the opposite direction of McQuillen Field on Marion Road. In the surveillance video, Tiedemann is wearing dark-colored shorts and shoes. Cellular-telephone records also show that a call was transmitted at 4:35 p.m. the same day from Tiedemann's girlfriend to Tiedemann's cellular telephone through a transmission tower that could not have reached a person at McQuillen Field. But the transmission could reach a person who was close to the location of the sexual assault. And police determined that the headphone cord recovered from the scene of the sexual assault contained DNA that closely matches Tiedemann's DNA profile.

In July 2008, Tiedemann requested a family meeting to say goodbye because he intended to "turn himself in." At that family meeting on July 13, Tiedemann's family members intimated that Tiedemann may have been involved in either a 2007 offense or the more recent June 2008 sexual assault of a 15-year-old girl in Rochester. Tiedemann told his family that he had something to do with "the most recent one," but he did not

elaborate. Tiedemann's father asked him if the victim was a minor, and Tiedemann replied, "I guess." R.R., the boyfriend of Tiedemann's sister, also attended the July 13 family meeting. On July 25, Officer Sherry Bush questioned R.R., and R.R. advised Officer Bush that Tiedemann admitted to his sister and R.R. that he had sexually assaulted the 15-year-old girl in Rochester. In an August 2008 letter to his sister-in-law, Tiedemann wrote, "I understand that you and [my sister] are looking at the girl's side. . . . I may have wrecked her childhood. Yes, she should . . . be having fun. And for what I have done, her life may be messed up forever."

Tiedemann was charged by complaint with first-degree criminal sexual conduct and second-degree assault. On August 26, 2008, a grand jury returned an indictment against Tiedemann, charging him with using a dangerous weapon to commit first- and second-degree criminal sexual conduct causing fear of great bodily harm, in violation of Minn. Stat. §§ 609.342, subd. 1(c), 609.343, subd. 1(c) (2006), and first- and second-degree criminal sexual conduct causing personal injury using force or coercion, in violation of Minn. Stat. §§ 609.342, subd. 1(e)(i), 609.343, subd. 1(e)(i) (2006).

At the jury trial that followed, the district court admitted evidence, over Tiedemann's objection, of four prior crimes or bad acts committed by Tiedemann, including two criminal-sexual-conduct offenses, one attempted-robbery offense, and one uncharged incident of stalking behavior. The district court instructed the jury that the evidence was admitted for the limited purpose of proving identity. The district court also admitted, under the residual exception to the hearsay rule, Officer Bush's testimony regarding R.R.'s July 2008 statements to the police.

The jury found Tiedemann guilty of the charged offenses, and it found that he used a dangerous weapon to commit each offense. The district court sentenced Tiedemann to life imprisonment without the possibility of release. This appeal followed.

D E C I S I O N

I.

Tiedemann argues that the district court erred by admitting evidence of two prior sexual-assault offenses, one prior attempted-robbery offense, and one uncharged incident of stalking behavior. The district court's evidentiary rulings rest within its sound discretion and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Thus, to successfully challenge the district court's evidentiary rulings, an appellant must establish both that the district court abused its discretion and that the appellant was prejudiced. *Id.*

Evidence of other crimes, wrongs, or acts is "not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But this evidence may be admitted for other purposes, including to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Such evidence is properly admitted only if the following five requirements are met:

> (1) the prosecutor gives notice of its intent to admit the evidence consistent with the Rules of Criminal Procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence

> is not outweighed by its potential for unfair prejudice to the defendant.

Id; *accord State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). If the district court's admission of rule 404(b) evidence is erroneous and such erroneously admitted evidence significantly affected the verdict, we must reverse. *Ness*, 707 N.W.2d at 691.

A.

Tiedemann concedes that his two prior criminal-sexual-conduct offenses that were admitted in evidence meet the first three requirements of rule 404(b)—notice was given, the evidence was offered to prove identity, and the offenses were proved by clear-and-convincing evidence of Tiedemann's convictions. Tiedemann contends, however, that this evidence is not relevant and that its probative value is outweighed by its potential for unfair prejudice.

Evidence of a common scheme or plan may be used to establish identity. *State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998). Rule 404(b) evidence must be "substantially similar to the charged offense—determined by time, place and modus operandi," but need not be identical to the charged offense. *Id.* But when rule 404(b) evidence is introduced to show a common plan of scheme, it must bear a "*marked similarity* in modus operandi to the charged offense" that tends to corroborate evidence of the charged offense. *Ness*, 707 N.W.2d at 688 (emphasis added). When determining whether a prior act is markedly similar to the charged offense, that the prior act is of the same generic type generally is insufficient. *State v. Cogshell*, 538 N.W.2d 120, 123

(Minn. 1995). We are flexible in applying this test on appeal. *Kennedy*, 585 N.W.2d at 390.

The district court found Tiedemann's prior criminal-sexual-conduct offenses relevant to establish identity because they involved the offender "targeting strangers, pursuing women, covering up [his] identity by [the] wearing of masks, and [the use of] force and coercion to accomplish the violence." The evidence presented to the district court establishes that Tiedemann pleaded guilty in 1994 to two criminal-sexual-conduct offenses involving different victims that occurred in November 1993 and March 1994. In the 1993 offense, Tiedemann wore a ski mask and knocked on the door of the female victim's home. When the victim answered the door, Tiedemann forced his way inside, directed her not to scream or fight him, taped her mouth, taped her hands behind her back, and sexually assaulted her. In the 1994 offense, Tiedemann wore a ski mask, entered the female victim's home, hit her on the head, choked her, and taped her hands behind her back before sexually assaulting her.

Tiedemann contends that these prior offenses are dissimilar to the charged offenses because the victims were adults, the offenses occurred in the victims' homes, Tiedemann bound the victims, and he did not use a weapon. But there are many similarities between the manner in which Tiedemann committed the prior offenses and the manner in which the assailant committed the charged offenses. They include concealment of the assailant's identity by covering his face; the element of surprise; and the use of choking, force, and threats to sexually assault women vaginally. And although Tiedemann argues that the state, during closing argument, incorrectly referred to

Tiedemann's prior victims as strangers to establish additional similarities, the state's closing argument may be based on reasonable inferences from the evidence. *See State v. Jones*, 753 N.W.2d 677, 691-92 (Minn. 2008).

Tiedemann also contends that the prior criminal-sexual-conduct offenses are remote in time and place from the charged offenses. But we may uphold the admission of prior-bad-act evidence, notwithstanding remoteness in time or place, if the relevance of the evidence is otherwise clear. *Kennedy*, 585 N.W.2d at 390. Moreover, concerns about relevancy because of remoteness in time are lessened if the defendant was convicted of the prior offense and incarcerated during a significant portion of the intervening time, thereby preventing the commission of additional offenses. *Ness*, 707 N.W.2d at 689. Both of these factors are present here: Tiedemann was convicted of both prior criminal-sexual-conduct offenses, and he was incarcerated for approximately nine of the intervening 14 years between the prior offenses and the charged offenses. Thus, the district court did not abuse its discretion by finding that Tiedemann's prior criminal-sexual-conduct offenses were relevant to establishing identity.

The district court also found this evidence to be more probative than prejudicial. The evidence of Tiedemann's prior criminal-sexual-conduct offenses is probative because it established Tiedemann's identity and corroborated the circumstantial evidence connecting Tiedemann to the charged offenses. This corroboration was particularly important in this case because J.L. did not know her assailant, her assailant covered his face, and there were no eyewitnesses to the offense. *See id.* at 690 (observing that courts should consider state's need for prior-bad-act evidence when balancing probative value

against potential for unfair prejudice). The danger of unfair prejudice was limited for several reasons, including that only Tiedemann's guilty-plea colloquy was admitted in evidence rather than the more detailed complaints and police reports, this evidence covers only approximately 12 pages of more than 700 pages of trial transcript, and the district court gave cautionary instructions immediately before the presentation of the rule 404(b) evidence and again before closing arguments. *See State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008) (holding that cautionary instructions limited potential for unfair prejudice of prior similar conduct and lessened the probability that jury would give undue weight to evidence), *review denied* (Minn. Oct. 29, 2008).

Accordingly, the district court did not abuse its discretion by admitting this evidence of Tiedemann's prior criminal-sexual-conduct offenses after finding them more probative than prejudicial.

B.

Tiedemann also concedes that his prior attempted-robbery offense that was admitted in evidence meets the first three requirements of rule 404(b). But he contends that this evidence is not relevant and that its probative value is outweighed by its potential for unfair prejudice.

The district court found Tiedemann's prior attempted-robbery offense relevant to establish identity. The evidence presented to the district court was that Tiedemann entered a hair salon and taped the hands, feet, and mouths of an employee and a customer. Tiedemann wore a ski mask and threatened to kill the victims if they reported

his crime. He then demanded money, but he was scared off by another customer. As a result, he took nothing.

Tiedemann's prior attempted-robbery offense is remote in both place and time as it occurred in another city 14 years before the charged offenses. We may uphold the admission of evidence notwithstanding remoteness in time or place if the relevance of the evidence is otherwise clear. *Kennedy*, 585 N.W.2d at 390. But this is not the case here. This evidence does not establish that Tiedemann pursues women. It does not involve a sexual assault. And Tiedemann did not use a weapon. Because Tiedemann's prior attempted-robbery offense is not markedly similar to the charged offenses, its relevance and probative value are diminished. Therefore, the district court abused its discretion by admitting this evidence.[1]

C.

Tiedemann concedes that a prior uncharged allegation of stalking behavior that was admitted in evidence meets the first two requirements of rule 404(b). But he contends that this evidence was not proved by clear and convincing evidence, it is not relevant, and its probative value is outweighed by its unfairly prejudicial effect.

Outside the presence of the jury, J.W.-G. testified that, on March 11, 2003, a man followed her from a gas station in his car for a 37-block loop until J.W.-G pulled over and allowed his car to pass her while she noted its license plate number and called 911. She testified that Tiedemann may have been the man she saw. Minnesota Department of

[1] In light of this determination, we address whether this error significantly affected the verdict in Part I.D., *infra*.

Corrections Hearing Officer Katherine Halvorson testified that, at a 2003 supervised-release hearing, Tiedemann testified that, on March 11, 2003, he followed the same route as J.W.-G. in his car. But Tiedemann provided no explanation for doing so. The district court permitted J.W.-G. and Halverson to testify regarding these facts in the presence of the jury.

Tiedemann contends that the state did not prove by clear and convincing evidence that Tiedemann's behavior constituted stalking under Minnesota law. But rule 404(b) requires clear and convincing evidence that a prior "crime, *wrong*, or *act*" took place. Minn. R. Evid. 404(b) (emphasis added). The district court did not abuse its discretion by finding clear-and-convincing evidence that Tiedemann committed stalking behavior in 2003.

Evidence that Tiedemann exhibited stalking behavior against a stranger, however, does not necessarily establish that Tiedemann targets strangers as sexual-assault victims. And the record contains no evidence that the assailant stalked J.L. Rather, the record establishes only that the assailant approached J.L. from behind. Because Tiedemann's stalking behavior is not markedly similar to the charged offenses, its relevance and probative value are limited. Moreover, there was a significant danger that the jury would infer that Tiedemann intended to sexually assault J.W.-G. based on a propensity to sexually assault women. Accordingly, the district court abused its discretion by admitting this evidence.

D.

Having concluded that two incidents of Tiedemann's prior bad acts were erroneously admitted, we next consider whether this erroneously admitted evidence of Tiedemann's prior attempted robbery and stalking behavior significantly affected the verdict. *See Ness*, 707 N.W.2d at 691. The erroneously admitted prior-bad-act evidence constitutes approximately 14 pages of a more than 700-page transcript of a ten-day trial. The district court provided a cautionary instruction immediately before the prior-bad-act evidence was presented and again immediately before closing arguments. Moreover, even without the erroneously admitted evidence, the state's case was strong. Tiedemann made incriminating admissions to family members, a shoeprint at the scene of the assault closely matches the pattern on Tiedemann's shoe, the police recovered from Tiedemann's home knives that closely match J.L.'s description of the assailant's weapon and clothing that closely matches J.L.'s description of the assailant's clothing and that contained Tiedemann's semen, surveillance-video footage and cellular-telephone records contradict Tiedemann's alibi and are consistent with Tiedemann's guilt, and DNA from J.L.'s headphone cord closely matches Tiedemann's DNA profile. Also, Tiedemann's physical appearance matches J.L.'s description of the assailant's approximate age, height, weight, eyebrows, eye color, and hands. All of this highly probative evidence was properly admitted and available for the jury's consideration.

Our careful review of the record as a whole establishes that, although the district court abused its discretion by admitting two pieces of prior-bad-act evidence, the

erroneously admitted evidence did not significantly affect the verdict. Thus, Tiedemann is not entitled to a new trial on this ground.

II.

Tiedemann next argues that the district court erred by admitting Officer Bush's testimony regarding R.R.'s July 2008 statements to police because, he contends, this evidence was inadmissible hearsay. Evidentiary rulings rest within the district court's sound discretion and will not be reversed absent a clear abuse of discretion. *Amos*, 658 N.W.2d at 203. When challenging an evidentiary ruling, the burden rests with the appellant to establish that the district court abused its discretion and that the appellant was prejudiced. *Id.*

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible unless it falls within one of several exceptions. Minn. R. Evid. 802 (barring admission of hearsay), 803 (listing 22 exceptions to hearsay exclusion), 807 (stating residual exception to hearsay exclusion); *see also State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (observing that hearsay exceptions "generally reflect the recognized reliability of statements made in certain situations").

In a recorded interview on July 25, 2008, R.R. advised Officer Bush that, when Tiedemann's sister confronted Tiedemann at the July 13 family meeting regarding the recent sexual assault of a 15-year-old girl, Tiedemann nodded yes and said, "I did it." R.R. also advised Officer Bush that he asked if Tiedemann was talking about the rape of the 15-year-old girl, and Tiedemann answered, "Yes." At trial, however, R.R. testified

that he only remembers that Tiedemann "admitted . . . doing something to the most recent one." R.R. also testified that his memory of what occurred at the family meeting is not very good and that he gets confused. R.R. acknowledged that he met with Rochester police officers shortly after the family meeting. But R.R. maintained that a transcript of his prior statements would not refresh his memory for his testimony at trial. Tiedemann declined to cross-examine R.R. The state subsequently offered R.R.'s statements to the police through the testimony of one of the interviewing officers under Minn. R. Evid. 807, the residual exception to the hearsay rule. The district court admitted the hearsay evidence, finding that the statements are relevant, more probative than prejudicial, and the interests of justice support their admission.

A hearsay statement is admissible under rule 807 if (1) it has circumstantial guarantees of trustworthiness equivalent to other admissible hearsay statements, (2) the statement is offered as evidence of a material fact, (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, (4) admission of the statement best serves the general purposes of the rules of evidence and the interests of justice, and (5) the proponent of the statement gives the adverse party sufficient notice that it intends to offer the statement. Minn. R. Evid. 807. A district court "has considerable discretion in determining admission" of statements under exceptions to the hearsay rule. *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991).

Here, immediately following R.R.'s testimony, the state gave notice to the defense that it intended to offer the hearsay statements. And the hearsay statements are evidence

of a material fact—Tiedemann's direct admission of guilt. R.R.'s statements also are more probative on this point than any other evidence the state could procure through reasonable efforts, which the district court expressly found, because R.R.'s statements are the only evidence of an express admission by Tiedemann. Although a recording of the interview was available, the state argued that the recording would have to be redacted extensively to be admissible because the recording contained irrelevant and prejudicial statements about another offense that the district court previously had excluded from evidence. Thus, the second, third, and fifth requirements of rule 807 are met.

In *State v. Ortlepp*, the Minnesota Supreme Court determined that a hearsay statement had circumstantial guarantees of trustworthiness because (1) admission of the statement presented no Confrontation Clause problem since the declarant was available for cross-examination and admitted making the prior statement, (2) it was undisputed that the declarant actually made the statement because it was recorded, (3) the statement was against the declarant's penal interest, and (4) the statement was consistent with all of the other evidence the state introduced. 363 N.W.2d 39, 44 (Minn. 1985).[2] The *Ortlepp* factors do not constitute a strict test for determining admissibility under rule 807; rather, we must consider the totality of the circumstances. *See State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007).

Here, each of the *Ortlepp* factors is present except that the statements are not against R.R.'s penal interest. The district court observed that R.R. testified in court,

[2] The *Ortlepp* court analyzed whether statements qualified for admission under rule 803(24), which was replaced by rule 807 in 2006. Minn. R. Evid. 807 cmt.

permitting the jury to directly assess his credibility, and that R.R. had been available for cross-examination and could be recalled by either party.[3] Although R.R. did not admit that he made the prior statements, he testified that he attended the July 13 family meeting and spoke with an officer shortly thereafter. He also testified that his memory was better at the time of his police interview because it was closer in time to the family meeting. The district court observed that R.R.'s statements had been recorded and were discussed during the grand jury proceedings. And the hearsay statements are largely consistent with the testimony of other witnesses who attended the July 13 family meeting. Moreover, the state advised the district court that it intended to limit its direct examination of Officer Bush to avoid any speculative statements that R.R. made to the police. Thus, under the totality of the circumstances, these hearsay statements have ample circumstantial guarantees of trustworthiness.

Admission of the statements best served the general purposes of the rules of evidence and the interests of justice given the reliability of the statements under these circumstances and the limited manner in which they were introduced. These circumstances are analogous to those required by the prior-recorded-recollection exception to the hearsay rule. *See* Minn. R. Evid. 803(5) (providing an exception to the hearsay rule for "[a] memorandum or record concerning a matter about which a witness

[3] Tiedemann relies on *State v. Morales*, contending that R.R. was effectively unavailable for cross-examination because he testified that he lacked memory of the events. 788 N.W.2d 737, 759 (Minn. 2010). But the witness in *Morales* answered only one question on cross-examination, "was otherwise completely unresponsive" and refused to answer questions. *Id.* That is not the case here. R.R. answered many questions on direct examination despite his memory lapses, and Tiedemann elected not to cross-examine R.R.

once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness'[s] memory and to reflect that knowledge correctly"). The requirements of rule 807 were satisfied; and the district court did not abuse its discretion by admitting R.R.'s statements under the residual hearsay rule. Tiedemann, therefore, is not entitled to relief on this ground.

III.

In his pro se supplemental brief, Tiedemann argues that the evidence is insufficient to support his convictions. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the charged offenses based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* 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, reasonably could conclude that the defendant was guilty of the charged offenses. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

A guilty verdict may be based on the testimony of a single eyewitness. *See, e.g.*, *State v. Buckingham*, 772 N.W.2d 64, 71-72 (Minn. 2009). The testimony of a criminal-sexual-conduct victim need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2010).

J.L. testified that she was sexually assaulted. The state presented evidence of Tiedemann's admissions to family members, a shoeprint at the scene of the assault that closely matches the pattern on Tiedemann's shoes, knives recovered from Tiedemann's home that closely match J.L.'s description of the assailant's weapon, clothing recovered from Tiedemann's home that both closely matches J.L.'s description of the assailant's clothing and contained Tiedemann's semen, surveillance-video footage and cellular-telephone records that both contradict Tiedemann's alibi and are consistent with Tiedemann's guilt, and DNA obtained from J.L.'s headphone cord that closely matches Tiedemann's DNA profile. Additionally, Tiedemann's physical appearance matches J.L.'s description of the assailant's approximate age, height, weight, eyebrows, eye color, and hands.

When viewed in its totality in the light most favorable to the jury's guilty verdicts, the evidence, direct and circumstantial, strongly supports Tiedemann's convictions. *See State v. Taylor*, 650 N.W.2d 190, 206-07 (Minn. 2002) (upholding conviction based on circumstantial evidence when, viewed as a whole, the evidence led directly to guilt). As such, Tiedemann's challenge to the sufficiency of the evidence fails.

IV.

Tiedemann next argues that his life sentence should be reversed because the state manipulated the charges or because the sentencing statute is unconstitutional as applied to him. The district court sentenced Tiedemann to life imprisonment, which is the mandatory sentence when a defendant is convicted of first-degree criminal sexual conduct, the defendant has a prior conviction of a specified sex offense, and the fact-

finder determines that a heinous element exists in the present offense. Minn. Stat. § 609.3455, subd. 2(a)(2) (2006 & Supp. 2007). A "heinous element" is established if the defendant used or threatened to use a dangerous weapon to cause the victim to submit. *Id.*, subd. 1(d)(5) (2006 & Supp. 2007). A fact-finder may not consider a heinous element that is an element of the underlying offense. *Id.*, subd. 2(b) (2006 & Supp. 2007). Here, the heinous-element requirement was satisfied when the jury found that Tiedemann used a dangerous weapon to accomplish each offense.

Tiedemann first argues that the state improperly manipulated the charges to permit the district court to consider Tiedemann's use of a dangerous weapon as a separate "heinous element." We disagree. A prosecutor has broad discretion to decide what charges to bring against a defendant. *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668 (1978); *State v. Herme*, 298 N.W.2d 454, 455 (Minn. 1980). Such decisions are not subject to judicial review absent proof by the defendant of deliberate unjustifiable discrimination, such as that based on race, sex, or religion. *Herme*, 298 N.W.2d at 455. Because the record lacks any evidence that Tiedemann's charges were the result of unjustifiable discrimination, his challenge to the state's charging decision fails.[4]

[4] Tiedemann relies on *State v. Jackson*, 749 N.W.2d 353 (Minn. 2008), *State v. Simon*, 520 N.W.2d 393 (Minn. 1994), and *State v. Adell*, 755 N.W.2d 767 (Minn. App. 2008), *review denied* (Minn. Nov. 25, 2008), to argue that the district court erred in its sentencing decision. But *Jackson*, *Simon*, and *Adell* involve departures from the sentencing guidelines. *Jackson*, 749 N.W.2d at 357-58; *Simon*, 520 N.W.2d at 394; *Adell*, 755 N.W.2d at 773-75. These cases are inapposite here because a district court has discretion to depart under the sentencing guidelines but has no discretion under section 609.3455, subdivision 2(a)(2).

Tiedemann contends that section 609.3455, subdivision 2(a)(2), deprives him of the constitutional right to equal protection of the law. U.S. Const. amend. XIV, § 1 (providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"); *accord* Minn. Const. art. I, § 2. "The guarantee of equal protection of the laws requires that the state treat all similarly situated persons alike." *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997). "An essential element of an equal protection claim is that the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves." *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996), *review denied* (Minn. Jan. 7, 1997).

The constitutionality of a statute presents a question of law, which we review de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). In doing so, we presume that Minnesota statutes are constitutional; we will strike down a statute as unconstitutional only if absolutely necessary. *Id.* To prevail, the party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision. *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

"A statute violates the equal protection clause when it prescribes different punishments or different degrees of punishment for the same conduct committed under the same circumstances by persons similarly situated." *State v. Frazier*, 649 N.W.2d 828, 837 (Minn. 2002). Tiedemann does not contend that the state based the charges on his membership in a suspect class or that other similarly situated defendants were charged

differently. Rather, Tiedemann argues that, hypothetically, prosecutors in different counties could charge defendants committing the same offense differently, resulting in the imposition of different sentences. We have previously rejected this argument. *State v. Richmond*, 730 N.W.2d 62, 72 (Minn. App. 2007) (citing *United States v. Batchelder*, 442 U.S. 114, 124, 99 S. Ct. 2198, 2204 (1979)) (rejecting equal-protection challenge based on "the *potential* for unfettered prosecutorial discretion in electing whether to charge a defendant under the statute with the harsher penalty"), *review denied* (Minn. June 19, 2007). The state is entitled to discretion in its charging decisions, and "[a]lthough a prosecutor 'may be influenced by the penalties available upon conviction, . . . this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.'" *Id.* (quoting *Batchelder*, 442 U.S. at 125, 99 S. Ct. at 2205). "[T]he Equal Protection Clause prohibits selective enforcement only when it is based on an unjustifiable standard such as race, religion, or another arbitrary classification." *Id.* Here, Tiedemann has not presented *any* evidence of unlawful discrimination or selective enforcement. His contention that section 609.3455, subdivision 2(a)(2), violates his equal-protection rights, therefore, is unfounded.

Affirmed.