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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0150**

State of Minnesota,
Respondent,

vs.

Matthew William Hedstrom,
Appellant.

**Filed February 5, 2018
Affirmed
Kirk, Judge**

Clay County District Court
File No. 14-CR-16-2204

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

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Kirk,
Judge.

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

KIRK, Judge

Appellant challenges his 25-month prison sentence for felony fleeing a peace officer
in a motor vehicle under Minn. Stat. § 609.487, subd. 3 (2014), arguing that (1) the state
committed prosecutorial misconduct during its rebuttal-closing argument and denied him

a fair trial, and (2) the district court erred in adopting appellant's criminal-history score as listed in the presentence investigation (PSI) and sentencing worksheet because the state failed to prove the points for appellant's score by a preponderance of the evidence. We affirm.

FACTS

On June 28, 2016, at approximately 7:30 p.m., a sergeant and deputy sheriff from the Clay County Sheriff's Office and a Minnesota State Patrol trooper responded to a residential address in Barnesville to assist in executing an arrest warrant for appellant Matthew William Hedstrom. Law enforcement set up a "loose perimeter" around the property and waited for other officers to arrive before attempting to make contact with appellant. The deputy sheriff observed a person later identified as appellant get into the driver's seat of a vehicle parked outside the property and alerted the other officers at the scene. Law enforcement collapsed the perimeter and attempted to box appellant's vehicle in, but as the first marked squad car approached with its overhead lights activated, appellant drove up on the boulevard, sped away, and ran a stop sign.

The deputy sheriff and trooper pursued appellant's vehicle in their marked squad cars with the emergency lights and sirens activated, followed by the sergeant's marked squad car. They followed appellant's vehicle for several city blocks and observed appellant running stop signs before the trooper performed a pursuit intercept tactic (PIT) maneuver in order to stop appellant's vehicle and bring the pursuit to a safe end. Appellant was ordered out of the vehicle and placed under arrest. Appellant was charged with (1) fleeing

a peace officer in a motor vehicle, (2) reckless driving, and (3) driving without a valid driver's license. Counts two and three were dismissed prior to the start of trial.

A jury trial was held on September 27, 2016. Squad videos of the pursuit of appellant's vehicle were admitted into evidence, and the sergeant, deputy, and trooper who were at the scene testified consistently with the videos. The jury deliberated for nine minutes before finding appellant guilty of fleeing a peace officer in a motor vehicle. The district court ordered a PSI and scheduled sentencing for October 31. According to the PSI and sentencing worksheet, appellant had a criminal-history score of 11, which included 10 points for prior felony convictions and 1 custody-status point. Based on that criminal-history score, the district court sentenced appellant to a presumptive term of 25 months in prison, including a three-month custody-status enhancement. This appeal follows.

D E C I S I O N

I. The record does not support appellant's claim of prosecutorial misconduct.

Appellant requests a new trial, arguing that the state committed prosecutorial misconduct that denied him a fair trial. During jury selection, defense counsel asked prospective jurors if they had heard about the officer shooting in Tulsa, or that the officer was subsequently charged with manslaughter. During her closing argument, defense counsel again referenced the Tulsa officer shooting to argue that law enforcement officers do not have "unfettered access to do whatever [they] want" and that they must act lawfully. Defense counsel said that the officers' actions in this case did not rise to the level of what happened in Tulsa, but then suggested that appellant did not intend to flee and was merely

reacting to the first squad car coming at him outside the property. Defense counsel also described the use of the PIT maneuver as “unbelievable,” “unlawful,” and “inappropriate.”

In response, during the state’s rebuttal, the prosecutor characterized defense counsel’s suggestion that appellant was merely reacting as “unbelievable.” The prosecutor emphasized that the jury must look at the evidence in the record and said that defense counsel’s portrayal of the record was “manufactur[ed].” Defense counsel objected to the prosecutor’s rebuttal as burden shifting. The district court overruled the objection without explanation. The prosecutor went on to argue that defense counsel’s depiction of the evidence was “completely and utterly wrong,” and that it was “absolutely unbelievable and unfounded and ludicrous” to compare the officers’ conduct in this case to that of the officer in Tulsa.

On appeal, appellant argues that the prosecutor’s rebuttal did not go to the substance of defense counsel’s closing argument, and was instead aimed at disparaging defense counsel’s character and credibility. Appellant contends that the state cannot prove that his substantial rights were not impacted as a result, and argues that he is entitled to a new trial. The state argues that even if the prosecutor committed misconduct, it did not affect the case’s outcome or impact appellant’s substantial rights given the evidence against him.

At trial, appellant objected to the prosecutor’s rebuttal as burden shifting but did not object to the prosecutorial misconduct he now alleges on appeal. “Before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For unobjected-to prosecutorial misconduct, our review is under a modified plain-error

standard. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). If an appellant establishes that the prosecutorial misconduct is plain error, then the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *Id.* at 302. If all prongs of the modified plain-error standard are met, "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* (citing *Griller*, 583 N.W.2d at 740).

The prosecutor "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence" during closing argument. *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). Further, a "prosecutor has the right to fairly meet the arguments of the defendant." *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009). A prosecutor can also argue that a particular defense lacks merit. *See State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008). However, "a prosecutor may not belittle the defense, either in the abstract or by suggesting that the defense was raised because it was the only defense that might succeed." *Martin*, 773 N.W.2d at 108. And prosecutors "must avoid inflaming the jury's passions and prejudices against the defendants." *State v. Bailey*, 677 N.W.2d 380, 404 (Minn. 2004).

Our review of the record indicates that the prosecutor's challenged statements were in response to defense counsel's own highly charged closing argument in which defense counsel repeatedly questioned the actions of the law enforcement officers involved and inexplicably referenced an unrelated shooting by a Tulsa police officer. In response, the prosecutor repeated defense counsel's use of "unbelievable" to argue that appellant's defense lacked merit and was wholly unsupported by the evidence in the record. The record

shows that the prosecutor met defense counsel's arguments and attempted to discredit them by focusing the jury on the evidence proving appellant's guilt.

The record also shows that both defense counsel and the prosecutor made dramatic arguments and perhaps could have used less impassioned language. But even if we were to conclude that the state committed prosecutorial misconduct here, and that it was plain error for the court to allow the prosecutor's rebuttal arguments, there is nothing in the record to establish that there was a substantial impact on the jury's verdict, which was overwhelmingly supported by the record. Thus, we cannot conclude that the prosecutor's rebuttal arguments denied appellant his right to a fair trial.

II. Based on the record, we cannot conclude that the district court abused its discretion in relying on the criminal-history score listed in the unobjected-to PSI and sentencing worksheet.

Appellant challenges his sentence, arguing that the district court abused its discretion because the state failed to prove his prior federal and North Dakota convictions and his custody-status point by a preponderance of the evidence, and also failed to disprove that some of his convictions may have arisen from a single behavioral incident. At sentencing, appellant's PSI and sentencing worksheet indicated the following federal and North Dakota felonies:

1. Forgery (ND, 03/03/2003) – 0.5 point
2. Possession of stolen property (ND, 03/03/2003) – 1 point
3. Conspiracy to possess with intent to distribute and distribute a controlled substance (Federal, 09/29/2003) – 2 points
4. Aiding and abetting possession with intent to distribute a controlled substance (Federal, 09/29/2003) – 2 points
5. Aiding and abetting conspiracy to distribute a controlled substance (Federal, 09/29/2003) – 1 point
6. Theft of property (ND, 10/03/2003) – 1 point

7. Theft of property (ND, 08/12/2014) – 1 point
8. Burglary (ND, 08/12/2014) – 1 point
9. Reckless endangerment (ND, 11/24/2014) – 0.5 point
10. Fleeing or attempting to elude a police officer (ND, 11/24/2014) – 0.5 point

Appellant was assigned a criminal-history score of 11, which included 10 felony points and 1 custody-status point.¹ Appellant argues that the PSI and sentencing worksheet were insufficient proof to establish the points for his criminal-history score and that the state failed to prove that he was on parole or supervised release to support the custody-status point. Appellant further argues that convictions three and four have the same offense date, as do convictions nine and ten, so points should not have been assigned for all four convictions. Appellant requests that his sentence be reversed and that we remand for resentencing without the challenged points, unless the state can meet its burden of proof. The state argues that it was not required to provide additional proof, and that the PSI provided appellant's criminal-history score at sentencing, to which appellant did not object.

“The district court’s determination of a defendant’s criminal-history score will not be reversed absent an abuse of discretion.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). When a district court calculates an offender’s criminal-history score, it must take into consideration convictions from non-Minnesota jurisdictions, provided that “the state lays foundation for the court to do so.” *Id.*; see Minn. Sent. Guidelines 2.B.5 & cmt. 2.B.502 (2015). “The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would

¹ Partial points are rounded down to the nearest whole number. Minn. Sent. Guidelines 2.B.1.i. (2015).

constitute a felony in Minnesota.” *Maley*, 714 N.W.2d at 711; *see* Minn. Sent. Guidelines 2.B.5.

“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2014). “The state has the burden of proving the facts which establish the divisibility of a defendant’s course of conduct for purposes of section 609.035.” *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). Under the Minnesota Sentencing Guidelines, an offender convicted of multiple offenses based on a single behavioral incident generally receives criminal-history points only for the most serious offense. Minn. Sent. Guidelines 2.B.1.d. & cmt. 2.B.107 (2015). The state is not required to supply certified records but must provide persuasive evidence that would be sufficient under Minn. R. Evid. 1005. *Maley*, 714 N.W.2d at 711-12; *see State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). Minn. R. Evid. 1005 allows data compilations of the contents of an official record to be proven by certified copy or by the testimony of a witness who compared the compilation to the original.

The record shows that at various points in the district court proceedings both the parties and the court acknowledged appellant’s extensive criminal history. The state indicated that it was able to provide documentation and/or certified copies of appellant’s federal and out-of-state convictions, although it never did so. At the October 31 sentencing, both parties stated that they received and reviewed the PSI and said that they had no additions or corrections. The prosecutor summarized appellant’s felony convictions and asked for the upper duration of 25 months in prison. The prosecutor referenced the PSI as

evidence of appellant's convictions in his sentencing argument; appellant did not object. Defense counsel also acknowledged appellant's lengthy criminal history, but argued for a 20-month prison sentence. The district court imposed a 25-month prison sentence, concluding that appellant's "significant criminal history" and conduct posed "a serious public safety risk" and that "incarceration [wa]s appropriate and necessary."

Here, the only documentation provided for appellant's prior convictions and custody status was the PSI and sentencing worksheet prepared by the Department of Corrections (DOC), and a charging document from North Dakota indicating the underlying charges for convictions nine and ten. The corrections agent who prepared the documents did not testify to their accuracy. However, the record shows that appellant did not object to the documentation for, or the calculation of, his criminal-history score at the time of his sentencing. Further, on appeal, appellant does not actually dispute the existence of his prior federal and North Dakota felony convictions; he claims only that the state failed to prove them by a preponderance of the evidence.

Appellant cites to *State v. Maurstad* for the principle that "a defendant cannot forfeit [or waive] review of his criminal-history score calculation" and may correct his score "at any time." 733 N.W.2d 141, 147-48 (Minn. 2007) (quotation omitted). We believe that *Maurstad* is distinguishable from the case at hand because *Maurstad* pursued a corrected sentence in a postconviction petition after failing to object to the PSI or sentencing worksheet prior to or at sentencing. *Id.* at 142. In his postconviction petition, Maurstad argued that he was improperly assigned a custody-status point and asked to be resentenced with a lower criminal-history score. *Id.* The postconviction court denied Maurstad's

petition, ruling that because he failed to object to his criminal-history score at sentencing he had waived or forfeited his right to review. *Id.* This court reversed and remanded for resentencing after concluding that Maurstad had not forfeited his right to appeal by failing to object at sentencing, and the supreme court affirmed. *Id.* at 143.

Unlike *Maurstad*, in this case, appellant did not petition for postconviction relief. Although the state bears the burden of proving a defendant's out-of-state convictions in determining a defendant's criminal-history score, the state "is [also] permitted to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Further, the Minnesota Rules of Criminal Procedure provide that, "The court may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. Here, unlike in *Maurstad*, the state was not given an opportunity to cure, and the district court was not given an opportunity to review, the alleged deficiency in the documentation supporting appellant's criminal-history score.

"It is not within the province of this court to determine issues of fact on appeal." *Kucera v. Kucera*, 275 Minn. 252, 254-55, 146 N.W.2d 181, 183 (1966). Because we are not a fact-finding court, and because no challenge to appellant's criminal-history score was raised at the time of appellant's sentencing or in a request for postconviction relief, we cannot conclude that the district court abused its discretion in sentencing appellant based on the criminal-history score provided in the unobjected-to PSI and sentencing worksheet.

In addition, under the sentencing guidelines in effect at the time of appellant's offense, for a criminal-history score of *six or more*, the sentence range for a fleeing-a-peace

officer-in-a-motor vehicle conviction under Minn. Stat. § 609.487, subd. 3, was 20 to 25 months, with a presumptive term of 22 months, including a three-month custody-status enhancement. *See* Minn. Sent. Guidelines 2.B.2.c.(1), 4.A., 5.A. (2015). Even if appellant established that his criminal-history score was miscalculated because he received two or three points in error, his corrected criminal-history score would still be eight or nine, and thus, his presumptive sentence term, with the custody-status enhancement, would remain the same.

Affirmed.