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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1417**

State of Minnesota,
Respondent,

vs.

Scott Bernard Sheffield,
Appellant.

**Filed July 23, 2018
Reversed and remanded
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-16-19009

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his sentence for his first-degree burglary conviction, arguing that the state failed to satisfy its burden to prove that his out-of-state convictions were properly included in his criminal-history-score calculation. We reverse and remand.

FACTS

Appellant Scott Bernard Sheffield forcefully entered his ex-partner's apartment, strangled her, and took money from her wallet. Based on this incident, the state charged Sheffield with first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2014), domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2 (2014), and violation of a no-contact order under Minn. Stat. § 629.75, subd. 2(d)(1) (2014). The state offered Sheffield a plea agreement whereby he would plead guilty to the first-degree burglary charge and, in exchange, the state would move to dismiss the other two charges, and Sheffield would be sentenced to 108 months stayed with conditions for five years based on a criminal-history score of 6.

Sheffield's criminal-history score was calculated based on a presentence investigation report (PSI) and a sentencing worksheet that were completed by a probation officer and filed with the district court. In calculating Sheffield's criminal-history score, the probation officer relied on six out-of-state convictions—four felonies and two non-felonies.

The plea agreement provided that Sheffield's stayed sentence would be executed if he failed to appear for the sentencing hearing. Sheffield waived his right to a jury trial and

pleaded guilty to the first-degree burglary charge. The district court scheduled a sentencing hearing, but Sheffield did not appear. He was later taken into custody. At the rescheduled sentencing hearing, the state sought to enforce the plea agreement, asking the district court to execute the 108-month sentence. The district court determined that Sheffield was not amenable to probation because he failed to appear for the first sentencing hearing and executed the 108-month sentence. The district court also ordered Sheffield to pay restitution of \$1,500 to his ex-partner. This appeal follows.

DECISION

Sheffield argues that his sentence must be reversed and that we must remand for resentencing because the state failed to prove his out-of-state convictions by a preponderance of the evidence. To prove the out-of-state convictions, the state presented a PSI and a sentencing worksheet that listed his previous convictions. Sheffield did not object to the calculation of his criminal-history score at sentencing. As a result, his probation officer, who was present at the hearing, did not testify.

We first address the state's assertion that we should not consider Sheffield's challenge because he did not petition the district court for postconviction relief before appealing to this court. In support of this assertion, the state relies on an unpublished decision from this court, *State v. Hedstrom*, No. A17-0150, 2018 WL 700243, at *2-5 (Minn. App. Feb. 5, 2018). In *Hedstrom*, the appellant challenged his sentence, arguing that the state did not sufficiently prove his out-of-state convictions when calculating his criminal-history score. *Id.* at *1-4. At the sentencing hearing, the state only presented a PSI, a sentencing worksheet, and a charging document for two of the ten convictions. *Id.*

at *4. We affirmed the appellant’s sentence, reasoning that, because the appellant did not petition the district court for postconviction relief, “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.” *Id.*

We reject the state’s contention that *Hedstrom* is controlling here. *Hedstrom* is an unpublished case and is therefore not binding authority. Minn. Stat. § 480A.08, subd. 3(c) (2016) (“Unpublished opinions of the Court of Appeals are not precedential.”). Additionally, in *Hedstrom*, we concluded that “[e]ven 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.” 2018 WL 700243, at *4. Because *Hedstrom*’s conclusion was tailored to the specific facts in that case, it does not provide persuasive authority here.

Moreover, Minnesota appellate courts have repeatedly provided that a defendant does not waive his right to challenge an illegal sentence by failing to object at sentencing or petition for postconviction relief. *See, e.g., State v. Maurstad*, 733 N.W.2d 142, 147 (Minn. 2007) (“[T]he receipt of a mandatory presumptive sentence—which is necessarily predicated on a correct criminal history score under the Minnesota Sentencing Guidelines—is not a defendant’s right to waive, or logically, forfeit.”); *State v. Maley*, 714 N.W.2d 708, 714 (Minn. App. 2006) (stating that a defendant has an “absolute right to appeal an illegal sentence” and the “right to appeal an illegal sentence cannot be waived”). We may therefore consider Sheffield’s challenge to his sentence on direct appeal.

Sheffield argues that the state failed to sufficiently prove his out-of-state convictions. We will not reverse a district court's criminal-history score determination absent an abuse of discretion. *Maley*, 714 N.W.2d at 711. A district court must take into consideration a defendant's out-of-state convictions when calculating the defendant's criminal-history score, Minn. Sent. Guidelines 2.B.5 & cmt. 2.B.502 (2016), but the state must first "lay[] foundation for the court to do so," *Maley*, 714 N.W.2d at 711. The state has the burden of proving sufficient facts to justify consideration of a defendant's out-of-state convictions at sentencing and "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 constitute a felony in Minnesota." *Id.* A preponderance of the evidence means a greater weight of the evidence or that a claim is more likely true than not. *Id.* at 712.

To prove an out-of-state conviction, the state is not required to supply certified copies of the conviction, but it may supply such evidence as would be sufficient under Minn. R. Evid. 1005. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). Minn. R. Evid. 1005 states:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

In *Griffin*, the defendant argued that the state failed to prove his out-of-state convictions because it did not submit certified copies of the convictions. 336 N.W.2d at

525. The state submitted “considerable documentation,” and the district court noted that “it was very difficult, if not impossible, to get any documents from” the out-of-state county, particularly a certified copy of the conviction. *Id.* The supreme court concluded that “the state came forward with sufficient information to prove by a fair preponderance of the evidence that defendant had a prior conviction” in Illinois. *Id.* Similarly, in *State v. Jackson*, 358 N.W.2d 681, 683 (Minn. App. 1984), we determined that the state sufficiently proved an out-of-state conviction when a probation officer provided the district court with advice and unsworn testimony regarding his conviction, although the state did not present a certified copy of the out-of-state conviction.

But in *Maley*, we determined that the state did not sufficiently prove the out-of-state convictions when the state introduced neither certified copies of the convictions nor any other documentary support. 714 N.W.2d at 710-13. The state in *Maley* only provided a sentencing worksheet created from a probation officer’s PSI. *Id.* at 710. Because the state did not provide any admissible evidence under rule 1005 that sufficiently substituted for the official, certified record of conviction, such as other documentation or statements by the probation officer detailing how the out-of-state convictions were established, we reversed and remanded for resentencing. *Id.* at 712.

Here, the state did not present “considerable documentation” like the state did in *Griffin*. 336 N.W.2d at 525. Recognizing that the state would have likely had the probation agent testify if Sheffield had objected to the criminal-history score, we are nevertheless left with a record that lacks explanation for the calculation. The district court relied solely on a PSI that listed Sheffield’s out-of-state convictions and a sentencing worksheet that

appears to have been created by relying on the PSI. This evidence was not sufficient to allow the district court to determine that the prior convictions were valid, that Sheffield was the defendant involved, and that the crimes constituted felonies in Minnesota. The PSI, for example, provides 1 point for Sheffield's 2004 burglary-of-a-residence conviction in Hillsborough County, Florida, but it does not provide the offense date. Because the offense date is unknown, the district court could not have known what version of the Florida burglary statute it should have used to determine whether the out-of-state conviction constituted a felony in Minnesota. Because the state did not provide "persuasive evidence that sufficiently substitute[d] for the official, certified record of conviction," we conclude, as we did in *Maley*, that the state did not prove Sheffield's out-of-state convictions by a fair preponderance of the evidence. 714 N.W.2d at 710-12.

Sheffield also argues that the state did not prove that his out-of-state convictions were not part of a single behavioral incident. If a person's conduct constitutes more than one offense under Minnesota's statutes, the person may only be punished for 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). When calculating a criminal-history score and assigning felony points based on prior convictions that resulted from multiple sentences but arose from a single course of conduct, a district court may only assign points from the offense at the highest severity level. Minn. Sent. Guidelines 2.B.1.d.(1) (2016). Here, the PSI allocated 1.5 points for a first-degree car-jacking conviction and 1 point for a burglary-of-a-residence conviction. Sheffield was convicted

of both charges on November 12, 2004, but the state did not provide any evidence to establish that these convictions arose from separate behavioral incidents. Therefore, the state failed to prove the out-of-state convictions by a preponderance of the evidence. On remand, the district court may only include multiple criminal-history points for the November 12, 2004 convictions if the state proves by a preponderance of evidence that the convictions did not arise from a single course of conduct.

In closing, we address the state's assertion that it may submit additional evidence to prove the prior out-of-state convictions on remand. When a defendant does not object to a district court's determination that his out-of-state convictions are felonies, the state "is 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). Because Sheffield did not challenge his sentence before the district court and because the district court did not rule on this issue, the state may introduce additional evidence to prove the out-of-state convictions on remand.

Reversed and remanded.