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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0264**

State of Minnesota,
Respondent,

vs.

Clifton Dale Robinson,
Appellant.

**Filed January 7, 2019
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Mower County District Court
File No. 50-CR-17-1246

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelson, Mower County Attorney, Austin, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

ROSS, Judge

Clifton Robinson pushed his probation officer into a wall in his office and hit him with a door, resisting arrest for violating a probation condition. At Robinson's assault trial,

the prosecutor called several witnesses who either overheard the commotion or heard the probation officer say that Robinson pushed him, or both. The jury found Robinson guilty, and the district court sentenced him to 30 months in prison based in part on Robinson's prior out-of-state convictions. Robinson appeals, arguing that the testimony about the probation officer's statements was unfairly cumulative and that the state failed to prove Robinson incurred out-of-state convictions. He also argues that he was denied effective assistance of counsel and that one of his jurors was biased. Because the district court did not abuse its discretion by admitting the statements, and his complaints about his attorney and the jury fail, we affirm his convictions. But because the state did not offer sufficient evidence to prove Robinson incurred out-of-state convictions, we reverse his sentence and remand.

FACTS

Gary Kiekenapp is a Mower County probation officer who supervised Clifton Robinson. One of Robinson's conditions of probationary release was to abstain from drinking alcohol. According to Kiekenapp, the following events unfolded when Robinson appeared in Kiekenapp's office one morning in May 2017.

A breath test revealed that Robinson had consumed alcohol. Robinson denied drinking, claiming that he had used mouthwash an hour earlier. Kiekenapp, who could smell the odor of an alcoholic beverage on Robinson's breath, was unconvinced. The two began to argue, so Kiekenapp closed his office door. Kiekenapp administered another breath test, and again Robinson tested positive for alcohol. Kiekenapp told Robinson that he was under arrest for the probation violation, and he approached Robinson with

handcuffs. Robinson shoved him in the chest. The shove sent Kiekenapp into the wall behind his office door. Robinson threw open the door, which smashed into Kiekenapp's arm, and Robinson sprinted from the office. Kiekenapp suffered a bruise from being struck by the door and a sore back from being shoved into the wall.

Based on that account, the state charged Robinson with one count of fifth-degree felony assault and one count of fourth-degree assault for inflicting bodily harm on a probation officer. The state also charged him with two counts of assault for his alleged actions against Deputy Timothy Donovan of the Mower County Sheriff's office, who reported that Robinson had kicked him in the groin area during his arrest shortly after the office incident.

Kiekenapp testified at Robinson's trial to the account just described. Robinson testified also. He said that he never put his hands on Kiekenapp and that his being struck by the door must have sent him into the wall. The state called two witnesses who said they were near the office, heard scuffling from within the office, and heard Kiekenapp say that Robinson had shoved him. Another witness who saw Robinson flee from Kiekenapp's office heard Kiekenapp say Robinson pushed him. And a fourth witness, a police officer, also testified that Kiekenapp said that Robinson shoved him. The district court admitted a recording of Kiekenapp's 9-1-1 call describing what had happened.

The jury found Robinson guilty of the two offenses against Kiekenapp but not guilty of the two against Deputy Donovan. At sentencing, the state argued that Robinson had five criminal-history points and asked the district court to sentence him to 32 months in prison based in part on that score. The state relied solely on the presentence-investigation report

as evidence of Robinson's alleged criminal history. The district court sentenced Robinson to 30 months in prison, a sentence within the presumptive guidelines range for an offender with a criminal-history score of five.

Robinson appeals.

D E C I S I O N

Robinson raises two issues in his principal brief and two issues in his supplemental brief. He argues first that the district court admitted cumulative and unfairly prejudicial evidence of Kiekenapp's account of the assault. He argues second that the state did not offer sufficient evidence to prove his out-of-state convictions. His supplemental brief maintains that he was denied effective assistance of counsel and that his trial was unfair because of a juror's bias. Only his sentencing argument leads us to reverse.

I

We are not persuaded by Robinson's argument that he must have a new trial because the district court admitted six bits of evidence restating some part of Kiekenapp's account of the assault. Robinson did not object to this evidence at trial, so we will review his claim only for plain error. *See State v. Kelley*, 855 N.W.2d 269, 273 (Minn. 2014). To obtain relief from an unobjected-to error, Robinson must show that there was an error, that the error was plain, and that the error affected his substantial rights. *See id.* at 273–74. If he meets these elements, we would correct the error only if it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 274. Robinson fails to identify an error, so our analysis ends at the first step.

Robinson argues that the district court should have *sua sponte* limited evidence that essentially repeated Kiekenapp's account of the assault. We will not reverse the district court's evidentiary ruling unless it reflects a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Robinson argues only that the probative value of the evidence was substantially outweighed by the unfairly prejudicial and unnecessary presentation of cumulative evidence.

It is true that the various witness accounts were cumulative, mostly corroborating rather than adding details to Kiekenapp's version. But Robinson admits that the evidence was relevant, and the controlling rule calls for exclusion of evidence only when its probative value is *substantially* outweighed by the "*needless* presentation of cumulative evidence" or the danger of unfair prejudice. Minn. R. Evid. 403 (emphasis added). Proof that Robinson shoved Kiekenapp was necessary to the state's case, as both felony-assault charges required the state to establish that Robinson intentionally inflicted or attempted to inflict bodily harm on Kiekenapp. See Minn. Stat. §§ 609.224, subd. 1(2) and 609.2231, subd. 3(1) (2016). The corroborative evidence was particularly important in this case, where Robinson and Kiekenapp were the only eyewitnesses and Robinson denied Kiekenapp's account. The state attempted to persuade the jury that Kiekenapp's version of events was accurate by showing that he consistently reported that Robinson shoved him. We hold that the district court did not err, let alone plainly err, by failing to interrupt the trial *sua sponte* on the notion that the unobjected-to cumulative evidence was needless and unfairly prejudicial.

II

Robinson argues that the district court miscalculated his criminal-history score because the state provided insufficient evidence of his out-of-state convictions. We will reverse a district court's determination of a defendant's criminal-history score only if it has abused its discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). We first address a procedural challenge to the argument and then turn to its merits.

The state argues that Robinson waived his right to challenge his criminal-history score by not raising it in the district court. Precedent defeats the argument. The supreme court has explained, “[B]ecause a sentence based on an incorrect criminal history score is an illegal sentence—and therefore, under Minn. R. Crim. P. 27.03, subd. 9, [is] correctable ‘at any time’—a defendant may not waive review of his criminal history score calculation.” *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). The state argues that this precedent does not apply here because Robinson's failure to object deprived the state of the opportunity to cure its allegedly deficient evidentiary showing. We addressed a similar circumstance in *State v. Outlaw*, when we accommodated the defendant's right to challenge an unsupported sentence by considering the challenge but also prevented the state from being prejudiced by the tardy objections, remanding the case to allow the state to further develop the record. 748 N.W.2d 349, 355–56 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). That same approach is available here, and we reject the state's waiver argument.

Robinson correctly argues that the state failed to meet its burden to establish his prior out-of-state convictions by a preponderance of the evidence. The prosecutor relied

solely on the presentence-investigation report's reference to out-of-state convictions, introducing no other evidence to substantiate them. We have held that the state's reliance on a sentencing worksheet derived from a presentence-investigation report did not meet the preponderance-of-the-evidence standard. *Maley*, 714 N.W.2d at 710–12. The state attempts to distinguish *Maley* on the notion that the report in this case includes a statement that its contents are based on reliable sources, specifically, a computerized national database containing criminal-justice information for law enforcement. The database is a reasonable place to go to become informed of entries indicating charges and convictions, but it is no substitute for the documents embodying actual charges and convictions. The supreme court identified rule 1005 of the Minnesota Rules of Evidence as the standard for admissible evidence of a defendant's prior out-of-state convictions for sentencing purposes. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). The rule is clear:

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.

Minn. R. Evid. 1005. Neither the presentence-investigation report nor the database it cites meets the formalities of this rule. Because the state did not prove Robinson's prior out-of-state convictions, the sentence cannot rest on the criminal-history score derived from those convictions. We therefore reverse and remand for resentencing. But Robinson's failure to challenge his presumably accurate list of convictions as depicted in the report

cannot afford him a strategic sentencing windfall. So on resentencing, the district court should allow the state the opportunity to supplement the record with evidence of the convictions in light of this discussion, and the parties should be afforded the opportunity to address Robinson's criminal history in light of section 2.B.5 of the sentencing guidelines as it regards the appropriate weight to assign any out-of-state convictions.

III

Robinson argues in his supplemental brief that he was denied effective assistance of counsel. A decision denying an ineffective-assistance-of-counsel claim raises a mixed question of law and fact that we review de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To prevail on an ineffective-assistance-of-counsel claim, a defendant ordinarily must establish that his attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the outcome would have been different if not for the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Robinson's claim of error fails under this standard.

Robinson argues that his counsel failed to investigate whether the bruising on Kiekenapp's arm was at a location that matched where the door might have struck him. But an ineffective-assistance-of-counsel claim cannot prevail based on a second-guessing of mere strategy. *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014). Trial strategy includes which defenses to raise, the extent of investigation to conduct, and the selection of evidence to present to the jury. *Id.* Robinson's counsel chose, apparently as a matter of trial strategy, to argue that the sometimes-contentious relationship between a probation officer and a

probationer in this case led to an unfortunate instance of exaggeration on the part of Kiekenapp. So rather than to deny that a physical encounter occurred, the strategy seems to have been to accept that one occurred but to portray it as insignificant. This was not a winning strategy, but we have no reason to speculate that arguing that Kiekenapp's bruising resulted from a different source would have fared any better. More important for our analysis, whether Robinson's counsel should have raised the defense that Kiekenapp's bruising did not match the door, whether he should have investigated the possibility, and whether he should have presented evidence on that issue all fall into the bucket of unreviewable trial strategy. We decline to question Robinson's counsel's choice between reasonable strategies.

IV

Robinson argues also in his supplemental brief that the participation of a biased juror requires reversal. But we do not review whether a district court should have *sua sponte* stricken a juror. *State v. Geleneau*, 873 N.W.2d 373, 379–82 (Minn. App. 2015), *review denied* (Minn. Mar. 29, 2016). Robinson bases his claim that the juror was biased based on an answer the juror gave during preselection voir dire. Robinson forfeited the opportunity to raise his current challenge on appeal by failing to raise it in the district court. In fact, his attorney expressly waived the opportunity to challenge any of the jurors for cause. We will not consider the belated challenge.

Affirmed in part, reversed in part, and remanded.