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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1085**

State of Minnesota,
Respondent,

vs.

Ronald Lee Setterstrom,
Appellant.

**Filed July 1, 2019
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

St. Louis County District Court
File No. 69VI-CR-16-1272

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Karl G. Sundquist, Assistant County Attorney,
Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A St. Louis County jury found Ronald Lee Setterstrom guilty of third-degree
criminal sexual conduct. We conclude that the evidence is sufficient to prove that

Setterstrom used coercion to accomplish sexual penetration. We also conclude that the district court erred when calculating Setterstrom's criminal-history score by considering a prior out-of-state conviction for which there is no equivalent Minnesota offense. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

In February 2016, the City of Virginia Police Department received a report of a sexual assault. Detective Kral met with a 25-year-old woman, H.O., at a hospital emergency room, where a sexual-assault examination was performed by medical professionals. H.O. told Detective Kral that she had been sexually assaulted by a man named Ron, whom she knew as a frequent customer at the convenience store where she worked. H.O. provided Detective Kral with a detailed description of the incident, which was generally consistent with her subsequent trial testimony.

At trial, H.O. testified as follows: On the day of the incident, Setterstrom was a customer at the convenience store where H.O. worked. In conversation with him, she mentioned that she did not have enough money to go out with her friends. Setterstrom offered her money, but she declined. Setterstrom then said that he would pay her \$50 to clean the floors at a house he was remodeling. H.O. accepted the offer and met Setterstrom at the property shortly after 4:00 p.m., when she finished her shift at the convenience store. No one else was present at the house. Setterstrom gave her \$50 when she arrived, showed her around the house, and walked her down to the basement. H.O. did not see any floors that needed to be cleaned. Setterstrom grabbed her shoulders and began rubbing them, which made her feel uncomfortable. Setterstrom said, "You don't know what you do to

me,” and he hugged her. H.O. “laughed it off,” hugged him back, and went upstairs. At that point in time, H.O. did not feel that she was in danger. Setterstrom followed H.O. upstairs, grabbed her shoulders, and kissed her. H.O. told Setterstrom to stop, put her hand on his chest to keep him away from her, and told him to calm down, but he pressed her against the wall and continued to kiss her. She did not kiss him back and kept her hands at her sides. H.O. then feared that she might be raped and did not know whether it would be possible for her to leave. Setterstrom took off her jacket, lifted up her shirt, and unbuttoned her pants. While he did so, H.O. told him to stop, but he did not stop. H.O. felt “small” because she is only five feet tall and Setterstrom is more than six feet tall, and she did not believe that she could stop him. Setterstrom moved her onto a nearby bathroom counter. H.O. tried to dissuade Setterstrom from continuing by telling him that she was menstruating. Setterstrom engaged in oral sex for 20 to 30 seconds. Setterstrom then inserted his penis into her vagina for a few minutes until he ejaculated. H.O. did not tell him to stop because she felt “defeated,” and she did not fight him “because he’s a big guy” and she did not believe that she could get away. After Setterstrom said that his wife soon would be home from work, H.O. got dressed, tried to return Setterstrom’s money to him, and left. H.O. testified that the sexual activity was not consensual.

After interviewing H.O., Detective Kral promptly identified the alleged perpetrator as Setterstrom, who then was 56 years old. Detective Kral asked H.O. to send text messages to Setterstrom to elicit information from him about the incident. When H.O. did so, Setterstrom responded by apologizing and writing that he would not have “gone any further” if H.O. had asked him to stop. Detective Kral then contacted Setterstrom, who

went to the police station and voluntarily provided an oral statement. He said that H.O. made sexual advances toward him and that he kissed her but that no other sexual activity occurred. Setterstrom voluntarily provided a DNA sample, which Detective Kral submitted to the Bureau of Criminal Apprehension for comparison with genetic material obtained in H.O.'s sexual-assault examination. In June 2016, Detective Kral informed Setterstrom that his DNA sample matched semen found on a cervical swab from the sexual-assault examination of H.O. Setterstrom responded that his semen must have been transferred to H.O.'s cervix by her hands after she touched his penis.

In September 2016, the state charged Setterstrom with third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2014). The case was tried to a jury on two days in January 2018. Setterstrom stipulated to the fact that he penetrated H.O.'s vagina with his penis and that his DNA was found on the cervical swab; the contested issue was whether he did so with force or coercion. The state called four witnesses: H.O., a friend of H.O. with whom she spoke immediately after the incident, H.O.'s fiancé, and Detective Kral. The state also introduced several exhibits, including audio-recordings of Setterstrom's two oral statements, photographs of the house where the incident occurred, and screenshots of text messages that H.O. and Setterstrom exchanged shortly after the incident.

Setterstrom testified in his own defense, as follows: As he was showing H.O. around the house, he turned away from her briefly and when he turned back, she was face-to-face with him, grabbed his crotch, and asked suggestively if he really wanted her to clean. He was shocked and continued showing her the house, but when H.O. approached

him again in a similar manner, he kissed her. H.O. kissed him back, lifted up her shirt, and made a sexually suggestive comment about his penis. H.O. unbuttoned her pants and pushed his head down toward her vagina as if she wanted him to perform oral sex, and they later engaged in intercourse. He testified that the entire encounter was consensual. Setterstrom did not introduce any other evidence.

The jury found Setterstrom guilty. Before sentencing, a probation agent prepared a sentencing worksheet that assigned criminal-history points to Setterstrom based on four prior felony convictions in Florida. The parties disputed the appropriate number of points to assign to the Florida convictions when calculating Setterstrom's criminal-history score. At the sentencing hearing in April 2018, the district court assigned two criminal-history points to the Florida convictions. Based on a criminal-history score of two and a severity level of C, the presumptive sentencing guidelines range was an executed sentence of between 65 and 91 months of imprisonment. Minn. Sent. Guidelines 4.B (2015). The district court imposed a 76-month sentence. Setterstrom appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Setterstrom argues that the evidence is insufficient to prove that he used force or coercion to accomplish sexual penetration of H.O. In response, the state argues that Setterstrom used coercion but not force to accomplish the penetration.

When reviewing the sufficiency of the evidence, we undertake “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813

N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We must assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). A verdict will not be overturned if the jury, “acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

“A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor uses force or coercion to accomplish the penetration.” Minn. Stat. § 609.344, subd. 1(c). Coercion is defined by statute to mean

[1] the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or [2] the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will.

Minn. Stat. § 609.341, subd. 14 (2014) (alterations added). “Proof of coercion does not require proof of a specific act or threat.” *Id.*

In considering Setterstrom’s argument that the evidence is insufficient, we are obligated to view the evidence in the light most favorable to the verdict. *Ortega*, 813 N.W.2d at 100. After reviewing the evidence in that light, we conclude that a jury reasonably could find that Setterstrom used coercion to accomplish sexual penetration. Such a finding is reasonable because H.O. testified that she and Setterstrom were alone in the house, that Setterstrom is significantly larger than she is, that he grabbed her and kissed

her even though she did not reciprocate his advances, that he did not stop when she repeatedly told him to stop, that she was scared and felt like she could not stop him and could not leave, and that the encounter was nonconsensual. To be sure, Setterstrom's testimony conflicts with H.O.'s testimony in many ways. But we must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." See *Caldwell*, 803 N.W.2d at 384.

Setterstrom contends that the evidence is insufficient on the ground that the state "presented no evidence that appellant inflicted or threatened to inflict physical harm on H.O." He points to H.O.'s testimony on cross-examination that she previously told Detective Kral that she did not believe that Setterstrom intended to hurt her physically, that she did not believe that he was an aggressive man, and that Setterstrom may have believed that the sexual activity was consensual because she did not resist. He contends that H.O.'s admissions on cross-examination are inconsistent with the caselaw stating that coercion exists if "an abuser intentionally creates an atmosphere of fear." *State v. Gamez*, 494 N.W.2d 84, 87 (Minn. App. 1992), *review denied* (Minn. Feb. 23, 1993). Setterstrom's contention is focused on the first part of the two-part statutory definition of coercion, which is phrased in the disjunctive. See Minn. Stat. § 609.341, subd. 14. The second part of that definition is "the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will." *Id.* The state emphasized the second part of the statutory definition in its closing argument, pointing several times to the size difference between H.O. and Setterstrom. H.O.'s testimony is sufficient to prove that Setterstrom used

coercion in the second sense of the statutory definition, even if she did not fear that he would cause her bodily harm.

Thus, the evidence is sufficient to prove that Setterstrom used coercion to accomplish sexual penetration of H.O. and, thus, is sufficient to support the conviction of third-degree criminal sexual conduct.

II. Criminal-History Score

Setterstrom argues in the alternative that the district court erred at sentencing on the ground that it miscalculated his criminal-history score, which caused the district court to sentence him according to an incorrect presumptive sentencing guidelines range. Specifically, he argues that the district court erred by assigning an additional point to his criminal-history score based on a prior out-of-state conviction for which there is no equivalent Minnesota offense.

A defendant's presumptive sentence is determined by the severity of the present offense and the defendant's criminal-history score. Minn. Sent. Guidelines 2 (2015). A criminal-history score is the "sum of points" that are assigned for eligible prior convictions and custody status at the time of the offense. Minn. Sent. Guidelines 2.B. The sentencing guidelines prescribe the points to be assigned to prior Minnesota convictions when calculating a defendant's criminal-history score based on the severity of the prior convictions. Minn. Sent. Guidelines 2.B.1. Convictions from other jurisdictions "must, in fairness, be considered in the computation of an offender's criminal-history score." Minn. Sent. Guidelines cmt. 2.B.502; *see also Hill v. State*, 483 N.W.2d 57, 60-61 (Minn. 1992). If a defendant has one or more prior convictions from another state, a district court must

determine the points to be assigned to those prior convictions by referring to the severity level of “the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense.” Minn. Sent. Guidelines 2.B.5. An out-of-state offense “may be counted as a felony only if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence, which includes the equivalent of a stay of imposition.” *Id.* In determining the points for an out-of-state conviction, the district court must “determine how the offender would have been sentenced had the [prior] offense occurred in Minnesota at the time of the current offense, not when the offense actually occurred out of state.” *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001); *see also* Minn. Sent. Guidelines 2.B.1.

“The State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). To satisfy that burden, “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 constitute a felony in Minnesota.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006) (citing *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983)). The district court “must make the final determination as to whether and how a prior non-Minnesota conviction should be counted in the criminal history score.” Minn. Sent. Guidelines 2.B.5.a.; *see also State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). We apply an abuse-of-discretion standard of review to a district court’s determination of a defendant’s criminal-history score. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Before sentencing, Setterstrom submitted records from a Florida court, which showed the following: In October 2004, he accepted \$3,572 to repair hurricane damage to a house but did not complete the work. In November 2004, Setterstrom accepted \$5,437 to repair hurricane damage to a different house and again did not complete the work. Setterstrom was not a licensed contractor when he entered into either contract. For each transaction, the State of Florida charged Setterstrom with one count of grand theft and one count of contracting without a license during a state of emergency. Both offenses are third-degree felonies under Florida law. Fla. Stat. §§ 489.127, subd. 2(c), 812.014, subd. 2(c) (2004). In August 2006, Setterstrom pleaded guilty to all four counts, and the Eighteenth Judicial Circuit Court imposed a stayed sentence of 48 months.

In this case, the probation officer's sentencing worksheet assigned four felony points to Setterstrom—one point for each of the Florida convictions. At the sentencing hearing, Setterstrom argued that he should be assigned only one and one-half points for the two convictions of grand theft and no additional points for the two convictions of contracting without a license during a state of emergency on the ground that there is no equivalent Minnesota offense. The state argued that Setterstrom's criminal-history score should be three points—one and one-half points for the two convictions of grand theft, which the state contended is equivalent to the Minnesota offense of felony theft, and one and one-half points for the two convictions of contracting without a license during a state of emergency, which the state contended is equivalent to the Minnesota offense of theft by swindle.

The district court assigned two felony points to Setterstrom for the Florida convictions. The district court did not explain specifically how it assigned the points. We assume that the district court did not assign points for the two convictions arising from the October 2004 contract because that contract was for less than \$5,000 such that an equivalent Minnesota offense would be of a lesser severity level. It appears that the district court assigned one point for the November 2004 grand-theft offense (presumably because it is equivalent to theft of more than \$5,000, *see* Minn. Stat. § 609.52, subd. 2(a)(1) (2014)) and one point for the November 2004 offense of contracting without a license during a state of emergency (presumably because the state argued that it is equivalent to theft by swindle of more than \$5,000, *see id.*, subd. 2(a)(4)). *See* Minn. Sent. Guidelines 2.B.1.d.2.

On appeal, Setterstrom contends that his criminal-history score should be based solely on his Florida convictions of grand theft. The guidelines would assign one point to the felony offense of theft of more than \$5,000 and one-half point to the felony offense of theft of \$5,000 or less. The sum of one and one-half points must be rounded down to a criminal-history score of one point. *See* Minn. Sent. Guidelines 2.B.1.a, 2.B.1.i, 5, 7 (2015). Setterstrom contends that no felony points should be assigned to his two Florida convictions of contracting without a license during a state of emergency on the ground that there is no equivalent criminal offense in Minnesota but, rather, only civil penalties. *See* Minn. Stat. §§ 326B.805, subd. 3, .845, subd. 2 (2014).

The state responds that Setterstrom's Florida conviction of contracting without a license during a state of emergency is equivalent to the Minnesota felony offense of theft by swindle. The state reasons that Setterstrom swindled his Florida customers because "he

tricked [them] into thinking that he could perform the work as a licensed contractor in an emergency situation.”

The Florida statute at issue provides, “No person shall . . . [e]ngage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority.” Fla. Stat. § 489.127, subd. 1(f) (2004). The statute further states, “Any unlicensed person who commits a violation of subsection (1) during the existence of a state of emergency declared by executive order of the Governor commits a felony of the third degree.” *Id.*, subd. 2(c). The Minnesota statute on which the state relies provides that whoever “by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person” commits theft. Minn. Stat. § 609.52, subd. 2(a)(4).

The Florida offense and the Minnesota offense are different in a crucial way. “Theft by swindle requires the intent to defraud,” and “inherent in the intent requirement is that a swindler must act affirmatively to defraud another.” *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). The caselaw reveals that “the essence of a swindle is defrauding another person [of property or services] by an intentional misrepresentation or scheme.” *Id.*; see also *State v. Hodge*, 123 N.W.2d 323, 324-25 (Minn. 1963); *State v. Wells*, 121 N.W.2d 68, 68-70 (Minn. 1963); *State v. Pirsig*, 670 N.W.2d 610, 614-16 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). In contrast, the Florida statute concerning contracting without a license during a state of emergency does not require intent to defraud or actual fraud or a misrepresentation; it requires only that a person be engaged in the

business of contracting during a state of emergency without being licensed to do so. Fla. Stat. § 489.127, subds. 1(f), 2(c). An unlicensed person who fully performs contracting work to a customer's satisfaction during a state of emergency would be guilty of the Florida offense but not the Minnesota offense. Conversely, a licensed contractor who defrauds a customer or makes a misrepresentation to a customer would be guilty of the Minnesota offense but not the Florida offense. Accordingly, the two offenses are not equivalent.

Thus, the state did not satisfy its burden of proving that the Florida offense of contracting without a license during a state of emergency is equivalent to a felony offense in Minnesota. Consequently, the district court erred by assigning two felony points instead of one felony point to Setterstrom's prior Florida convictions. On remand, the district court shall recalculate Setterstrom's criminal-history score by considering only the two Florida grand-theft convictions and, thereafter, shall impose a presumptive sentence based on the recalculated criminal-history score.

Affirmed in part, reversed in part, and remanded.