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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0760**

State of Minnesota,
Respondent,

vs.

Mark Andrew Huyber,
Appellant.

**Filed May 11, 2020
Affirmed in part, reversed in part, and remanded; motion granted
Slieter, Judge**

Olmsted County District Court
File No. 55-CR-18-4492

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

Mark Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Slieter, Judge; and
Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SLIETER, Judge

In this direct appeal from final judgments of conviction, appellant Mark Andrew Huyber challenges his aggravated sentence. Huyber argues that (1) the district court erred by permitting the state to seek an aggravated sentence when the state failed to timely file its notice pursuant to Minn. R. Crim. P. 7.03; (2) the chief judge erred by not disqualifying the presiding judge from the aggravated-sentencing trial; and (3) the district court incorrectly calculated his criminal-history score. Because the existence of good cause and lack of unfair prejudice against Huyber supports the district court's acceptance of the state's late notice seeking an aggravated sentence, and the circumstances did not require the presiding judge to be disqualified, we affirm in part. Although the district court properly calculated Huyber's criminal-history score at the time of sentencing, the amelioration doctrine as applied to the recent modifications of the Minnesota Sentencing Guidelines requires us to reverse and remand for resentencing.

FACTS

The state charged Huyber with second-degree burglary, in violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2016), and stalking, in violation of Minn. Stat. § 609.749, subd. 4(b) (2016). Huyber pleaded guilty to both charged offenses at his second court appearance; there was no agreement with regard to sentencing. The district court accepted the guilty plea for both charges and scheduled a sentencing hearing.

Before the sentencing date and in order to seek an aggravated sentence pursuant to Minn. Stat. § 609.1095, subd. 2 (2016), the state moved to schedule the matter for a hearing

to consider its late aggravated-sentencing motion. The state filed its motion 36 days after the second court appearance and 11 days before the scheduled sentencing hearing. Huyber opposed the state's motion because it was untimely pursuant to Minn. R. Crim. P. 7.03.

The district court held a hearing on the state's motion and, in granting the state's request to proceed with its late aggravated-sentence notice, found good cause was present and that Huyber would not be unfairly prejudiced.

The district court subsequently held a hearing on the state's notice to seek an aggravated sentence. Huyber waived all challenges to the probable-cause determination for an aggravated sentence and waived his right to a jury trial to address whether any aggravated-sentencing factor existed. The district court accepted Huyber's waivers, found probable cause to proceed, and set the matter for a bench trial.

During the aggravated-sentencing trial, the state offered evidence of Huyber's 1999 homicide conviction. The judge noted that he presided over that case and that he thinks about it when he drives past the location of the homicide.

Following this statement by the presiding judge, Huyber's counsel requested that the presiding judge recuse himself based on his "remarkable disclosure." The presiding judge denied the recusal request and allowed Huyber to move for removal before the chief judge of the judicial district. The chief judge of the judicial district denied Huyber's request. The parties reappeared before the presiding judge to resume the aggravated-sentencing trial. The presiding judge found that the evidence supported an aggravated factor because Huyber met the definition of a dangerous offender who committed a third violent crime.

During sentencing, the district court assigned Huyber five criminal-history points, which included one custody-status point because Huyber “was discharged from probation early and he committed this offense within the original term of probation.” The district court imposed an upward durational departure of an 81-month prison sentence for stalking concurrent with a 43-month prison sentence for second-degree burglary. This appeal follows.

D E C I S I O N

I. The district court properly allowed the state to seek an aggravated sentence pursuant to Minn. R. Crim. P. 7.03.¹

Huyber argues that the district court erred by permitting the state to seek an aggravated sentence pursuant to Minn. R. Crim. P. 7.03 after he pleaded guilty to both offenses in the complaint because the late notice was not supported by good cause and he experienced prejudice as a result of the district court’s decision. We are not persuaded.

“The interpretation of the Minnesota Rules of Criminal Procedure is a question [appellate courts] review de novo.” *See Reynolds v. State*, 888 N.W.2d 125, 129 (Minn. 2016) (footnote omitted). “In interpreting the rules of criminal procedure, ‘[appellate

¹ We reviewed Huyber’s motion to strike a portion of the state’s appellate brief related to the aggravated-sentence issue on appeal. “The record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of proceedings, if any.” Minn. R. Crim. P. 28.02, subd. 8. “An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). The state included a footnote in its brief to this court that referenced conversations between counsel for the state and the assigned prosecutor who filed the motions at the district court. This information is outside the record on appeal. We grant the motion to strike as the information is not part of the record on appeal and disregard the information in rendering this decision.

courts] look first to the plain language of the rule and its purpose.” See *State v. Lee*, 929 N.W.2d 432, 439 (Minn. 2019) (quoting *State v. Dahlin*, 753 N.W.2d 300, 305 (Minn. 2008)). “If the language is plain and unambiguous, [appellate courts] follow the plain language of the rule.” See *id.* “Because the construction of procedural rules is reviewed de novo, we review de novo whether the notice in this case fulfills that required in the rules.” *State v. Robideau*, 817 N.W.2d 180, 188 (Minn. App. 2012).

For the state to seek an aggravated sentence, it must provide notice to the defendant.² *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009) (“[T]he State must notify the defense of anticipated upward-departure grounds before trial, and the applicability of the noticed grounds is an issue the district court is to resolve at the omnibus stage of the case.”). Pursuant to Minn. R. Crim. P. 7.03,

The prosecutor must give written notice at least seven days before the Omnibus Hearing of intent to seek an aggravated sentence. *Notice may be given later if permitted by the court on good cause and on conditions that will not unfairly prejudice the defendant.* The notice must include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

(Emphasis added.)

An omnibus hearing occurs in felony and gross-misdemeanor cases when a defendant has yet to plead guilty. Minn. R. Crim. P. 11.01. Such an omnibus hearing “must start within 42 days of the Rule 5 appearance if it was not combined with the Rule 8

² Minnesota Rule of Criminal Procedure 7.03 “establishes the notice requirements for a prosecutor to initiate proceedings seeking an aggravated sentence in compliance with *Blakely v. Washington*, 542 U.S. 296, 301-305 (2004).” Minn. R. Crim. P. 7.03 cmt.

hearing, or within 28 days of the Rule 5 appearance if it was combined with the Rule 8 hearing.” *Id.* (a).

An omnibus hearing is not required in all criminal cases and, as was the situation in this matter, an omnibus hearing does not occur if the defendant enters a guilty plea either at an initial appearance or the rule 8 hearing. *See* Minn. R. Crim. P. 8.02, subd. 1 (“If the defendant pleads guilty, the pre-sentencing and sentencing procedures in these rules must be followed.”). Based on Huyber’s guilty plea at the rule 8 hearing, the district court did not schedule an omnibus hearing and instead scheduled the matter for sentencing.

At a hearing on the state’s motion to permit an untimely aggravated-sentencing motion, the district court properly applied rule 7.03’s timing exception. The comments to rule 7 also recognize this occurrence,

The rule recognizes that it may not always be possible to give notice by seven days before the Omnibus Hearing and the court may permit a later notice for good cause so long as the later notice will not unfairly prejudice the defendant. In making that decision the court can consider whether a continuance of the proceedings or other conditions would cure any unfair prejudice to the defendant. Pretrial issues concerning a requested aggravated sentence will be considered and decided under the Omnibus Hearing provisions of Rule 11.

Minn. R. Crim. P. 7.03 cmt.; *see State v. Pero*, 590 N.W.2d 319, 326 (Minn. 1999) (stating that “comments [to the Minnesota Rules of Criminal Procedure] are recognized as providing guidance which courts may follow”). We, in reviewing the district court’s decision to permit the late notice, follow the plain language of the rule.³

³ The state argued in its brief that we should look to Minn. R. Crim. P. 27.03, subd. 1(B)(6), as permitting their motion. The state’s argument is misguided. Rule 27.03, subd. 1(B)(6),

Good Cause

The Minnesota Rules of Criminal Procedure do not provide a definition for good cause. We look to the legal dictionary definition to interpret the meaning of good cause because it is a term used in the legal context. *See Bergman v. Caulk*, 938 N.W.2d 248, 251 (Minn. 2020) (applying legal dictionary definitions to determine the plain meaning of a word when used in the legal context). Good cause is defined as “[a] legally sufficient reason.” *Black’s Law Dictionary* 266 (10th ed. 2014).

Huyber contends that the state failed to act diligently such that there is no basis for good cause. The state explained its reason for not filing the notice until 34 days after the entered guilty plea by noting that Huyber filed no documentation before the rule 8 hearing suggesting that he intended to plead guilty to the offenses. At the rule 8 hearing, the prosecutor who appeared for the state was not assigned to the case. The assigned prosecutor learned about Huyber’s guilty plea that day after the hearing. When Huyber pleaded guilty, the state did not have BCA reports related to the matter nor had law enforcement completed its investigation. The assigned prosecutor “had a personal matter that was very serious and important that [he] needed to address,” which kept him out of the office for almost two weeks. Upon the assigned attorney’s return, he met with the victim about the matter and filed the motion and notice to seek an aggravated sentence.

relates to motions at a sentencing hearing to address issues related to a presentence investigation or the sentencing worksheets. Reading rule 27.03, subd. 1(B)(6), to encompass a motion to seek an aggravated sentence covered by rule 7.03 would undermine the goal of providing notice to a defendant about the state’s intent to seek an aggravated sentence early on in a criminal matter.

The state presents a sufficient explanation for its non-filing of its aggravated-sentence notice by the date that Huyber plead guilty. After it made its determination to seek an aggravated sentence, the assigned prosecutor experienced an emergency that required their attention out of the office. In summary, we conclude, as did the district court, that good cause existed for the late notice.

Unfair Prejudice

Even when otherwise supported by good cause, however, late notice may be permitted only “on conditions that will not unfairly prejudice the defendant.” Minn. R. Crim. P. 7.03. The comment to rule 7 notes that “the court can consider whether a continuance of the proceedings or other conditions would cure any unfair prejudice to the defendant.” Minn. R. Crim. P. 7.03 cmt.

Huyber, in arguing the presence of unfair prejudice by allowing the late notice, relies on the negative impact of having to engage in an aggravated-sentencing trial to determine whether he qualified as a dangerous offender who committed a third violent crime, he remained in custody while the case proceeded on the aggravated-sentencing trial, and he ultimately received a sentence above the presumptive guideline sentence. Although Huyber experienced these consequences, we conclude that they do not constitute the sort of prejudice that rule 7.03 is protecting a defendant from experiencing.

We acknowledge the concern that a defendant who enters a guilty plea may be surprised by the state’s late request to seek an aggravated sentence. The district court recognized this concern and noted that it would consider a request by Huyber to withdraw his guilty plea. Allowing a defendant to withdraw the guilty plea after later learning about

the potential aggravated sentence would certainly avoid any unfair prejudice related to the decision to plead guilty.

We recognize another area of potential concern when the state files such late notice is that a defendant may not be prepared to proceed to an aggravated-sentence trial. That concern is not present here. The district court granted the state's request to provide the late aggravated-sentence notice on August 27, 2018, and the trial on the aggravated sentence did not occur until January 2019. Huyber was provided an abundance of time to prepare a defense related to the aggravated-sentencing trial. Huyber was therefore not unfairly prejudiced due to a lack of preparation by the late notice of aggravated sentence.

Because the state had a good-cause basis to file its late notice to seek an aggravated sentence and Huyber was not unfairly prejudiced, the district court did not err by permitting the state to proceed on its late notice.

II. The judge was not disqualified.

Huyber argues that the presiding judge should have been removed from presiding over the aggravated-sentencing trial because of a statement that the presiding judge made about Huyber's 1999 homicide conviction. Huyber contends that the presiding judge's failure to be disqualified constitutes structural error by depriving him an impartial judge, which requires reversal of the sentence and remand for a new aggravated-sentencing trial.

"A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3). "Whether a judge has violated the Code is a question of law that [appellate courts] review de novo." *See State v. Mouelle*, 922 N.W.2d 706, 713 (Minn. 2019).

“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” Minn. Code of Jud. Conduct Rule 2.11(A). “Impartiality means the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues.” *Troxel v. State*, 875 N.W.2d 302, 314 (Minn. 2016) (quotation omitted). “In deciding whether disqualification is required, the relevant question is ‘whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality.’” *Mouelle*, 922 N.W.2d at 713 (quoting *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011)). Appellate courts perform this analysis from “the perspective of ‘an objective, unbiased layperson.’” *See id.* (quoting *Jacobs*, 802 N.W.2d at 753). And “[o]ur judicial system presumes that judges are capable of setting aside collateral knowledge they possess and are able to ‘approach every aspect of each case with a neutral and objective disposition.’” *State v. Dorsey*, 701 N.W.2d 238, 247 (Minn. 2005) (quoting *Liteky v. United States*, 510 U.S. 540, 561-62, 114 S. Ct. 1147, 1160 (1994) (Kennedy, J., concurring)).

The presiding judge made a statement during the aggravated-sentencing trial about his knowledge of Huyber’s 1999 homicide conviction because he presided over that matter as one of his first cases as judge. The interaction involved Huyber’s trial counsel stating, “Yes, Mr. Huyber has a conviction from a 1999 murder. Going on 20 years now. And what does the Court know about that murder? Absolutely nothing other than he has that conviction on his record.” The presiding judge responded that in fact Huyber’s 1999 homicide “case was about the first thing [he] touched as a new judge in the fall of 1999.”

The presiding judge acknowledged that Huyber’s trial counsel correctly identified that “there’s no description of exactly what happened.” And yet, the presiding judge explained, “I can’t walk – I can’t drive past, and I drive past it all the time, the location . . . without thinking about Mr. Huyber. So, you know, that’s something that stuck with me over the years.”

Before the presiding judge rendered his verdict on the aggravated factors, Huyber’s trial counsel orally requested that the presiding judge recuse himself. The presiding judge denied the request after noting that he did not bear any ill will or anger towards Huyber, rather that he acknowledged awareness of the case as part of his experience as a judge. Huyber’s trial counsel filed an emergency motion on the matter to the chief judge of the district.⁴ The chief judge denied Huyber’s request based on her determination that Huyber failed to establish a basis to support an appearance of partiality.

The mere assertion by a party that a judge is partial is not a *per se* basis to question a judge’s impartiality, but neither does a judge’s assertion of impartiality automatically dispel an otherwise reasonable question. *See State v. Burrell*, 743 N.W.2d 596, 602 (Minn. 2008). Parties commonly present information to a judge that results in the judge learning “highly prejudicial evidence” that “is even incriminating.” *Mouelle*, 922 N.W.2d at 713. And yet, appellate courts still “presume that the district court is able to set aside knowledge

⁴ “A request to disqualify a judge for cause must be heard and determined by the chief judge of the district or by the assistant chief judge if the chief judge is the subject of the request.” Minn. R. Crim. P. 26.03, subd. 14(3).

prejudicial to the defendant because doing so is necessary to the proper discharge of her duties.” *See id.* at 714.

We do not believe that an objective, unbiased layperson analyzing this issue would find a concern related to impartiality by these facts. The presiding judge knew about the 1999 homicide conviction and the conviction is part of Huyber’s criminal history that the state presented to support an aggravated factor for a dangerous offender who committed a third violent felony. *See* Minn. Stat. § 609.1095, subd. 2. The presiding judge’s knowledge of the 1999 case related to his personal involvement as the assigned judge. Although the judge acknowledged his recollection of the case when passing the site of the homicide and that it prompted his memory of Huyber, this exhibits no particular partiality of the judge or an inability to set aside such knowledge to address the facts of this particular case to determine an appropriate sentence. Our review of the record convinces us that the district court properly and impartially applied the presented evidence to the law. We therefore conclude that Huyber has no right to a new trial because the presiding judge did not engage in behavior that reasonably questions his impartiality.

III. Huyber is entitled to resentencing based upon the amelioration doctrine.

Huyber contends in his *pro se* supplemental brief that the district court erred by assigning him a custody-status point though he was discharged from his probationary period before committing the current criminal offense. The state does not respond to Huyber’s *pro se* argument. We bear the responsibility, even when a party fails to respond, to address the case based on the law. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

Huyber’s trial counsel objected at sentencing to Huyber’s criminal-history score, asserting that Huyber should only have four criminal-history points instead of five as shown on the sentencing worksheet. The sentencing-guidelines sheet reported that, of the five total criminal-history points, Huyber should be assigned one custody-status point for a 2014 felony conviction. In 2014, Huyber pleaded guilty to a felony offense, and the sentencing court stayed a 21-month prison sentence and placed Huyber on probation for five years. In 2015, the district court discharged Huyber from probation. The district court rejected Huyber’s argument at sentencing based on the plain language of the sentencing guidelines at the time: “Assign a custody point if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court.” Minn. Sent. Guidelines 2.B.2.a.(4) (Supp. 2017). We agree with the district court that the sentencing guidelines in effect on the date of sentencing required such a result.

In 2019, however, the Minnesota Sentencing Guidelines Commission removed the early-release-from-probation language from the sentencing guidelines as grounds to assign a custody-status point. See Minn. Sent. Commission, *Minnesota Sentencing Guidelines & Commentary August 2019 Amendments* 15 (2019), <http://mn.gov/msgc-stat/documents/Guidelines/2019/AdoptedModificationsMinnSentencingGuidelinesCommentary.pdf>.

As this court explained in *State v. Robinette*, the amelioration doctrine applies to the sentencing commission’s modification in this context. __ N.W.2d __, __, 2020 WL 1909348, at *5 (Minn. App. Apr. 20, 2020). Therefore, Huyber is entitled to resentencing based upon his corrected criminal-history score. See *State v. Oreskovich*, 915 N.W.2d 920,

928-29 (Minn. App. 2018) (holding that the appropriate remedy for an incorrect criminal-history score is remanding for resentencing). The record before us clearly shows that Huyber had been discharged from probation at the time of this offense. Because the record is clear on this fact, we therefore reverse and remand for the district court to resentence Huyber based upon a criminal-history score of four. The district court on remand may exercise its discretion, if it so chooses, to depart at resentencing because the district court provided reasons to do so at the original sentencing. *Cf. State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003) (“[A]bsent a statement of the reasons for sentencing departure placed on the record at the time of sentencing, no departure will be allowed.”).

Affirmed in part, reversed in part, and remanded; motion granted.