

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1652**

State of Minnesota,
Respondent,

vs.

Jordan Antonio Urena-Muro,
Appellant.

**Filed March 8, 2021
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Washington County District Court
File No. 82-CR-18-5389

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his convictions of first-degree aggravated robbery and second-degree assault, as well as his sentence for the robbery offense, arguing that the district court erred in ruling that the state could impeach him with prior convictions if he were to testify at trial, by failing to instruct the jury on lesser-included offenses, and in calculating his criminal-history score. We affirm the convictions, reverse the sentence, and remand for recalculation of appellant's criminal-history score and resentencing.

FACTS

Respondent State of Minnesota charged appellant Jordan Antonio Urena-Muro with several offenses stemming from a late night theft at a Walmart store, and ultimately tried two of the offenses to a jury: first-degree aggravated robbery and second-degree assault. Before trial, the state gave notice of its intent to impeach Urena-Muro with the following convictions if he were to testify at trial: fleeing police, terroristic threats, domestic assault, first-degree burglary, and fifth-degree controlled-substance crime. Urena-Muro objected to the impeachment evidence. The district court heard arguments from both parties, analyzed the issue on the record, and concluded that the convictions could be used for impeachment purposes. However, the district court ruled that the terroristic-threats and burglary convictions would be referred to as unspecified felonies to reduce the possibility of prejudice.

The state presented evidence that in December 2018, Urena-Muro stole items, including a suitcase, from a Walmart store. As he was exiting the store, an employee

confronted him and asked him for a receipt. When Urena-Muro refused to provide one, the employee grabbed hold of the suitcase. Urena-Muro punched the employee's arm, chest, and shoulder. When the employee refused to let go of the suitcase, Urena-Muro slashed at the employee with a box cutter, cutting the cuff of her sweatshirt. Urena-Muro fled the scene in a vehicle, but the police stopped the vehicle and arrested him. The police found stolen items from Walmart in the vehicle, as well as a box cutter. The Walmart theft was recorded on a surveillance video, which was admitted into evidence.

Urena-Muro elected not to testify at trial because he feared the prejudicial effect of his prior criminal record. Urena-Muro did not ask the court to provide a jury instruction regarding lesser-included offenses, and the district court did not provide one.

The jury found Urena-Muro guilty of both offenses. The district court entered judgments of conviction for both offenses, but imposed a sentence only for the robbery offense. This appeal followed.

DECISION

I.

Urena-Muro contends that the district court erred in ruling that the state could impeach him with five felony convictions if he were to testify at trial. A district court's ruling on a request to impeach with evidence of a prior conviction "will not be reversed absent a clear abuse of discretion." *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998) (quotation omitted).

Under Minn. R. Evid. 609, the credibility of a witness may be impeached with prior convictions. There are two types of convictions that may be admissible for impeachment

under rule 609. Minn. R. Evid. 609(a); *State v. Flemino*, 721 N.W.2d 326, 328 (Minn. App. 2006). One type of conviction that may be used for impeachment is a crime of dishonesty. Minn. R. Evid. 609(a)(2); *Flemino*, 721 N.W.2d at 328. As the state concedes, none of the convictions at issue here is a recognized crime of dishonesty for impeachment purposes.

The other type of conviction that may be used for impeachment is any felony-level offense, so long as “the probative value of admitting this evidence outweighs its prejudicial effect.” Minn. R. Evid. 609(a)(1); *Flemino*, 721 N.W.2d at 328. In making that determination, the court must consider the impeachment value of the prior crime, the conviction date and the accused’s subsequent history, the similarity of the past crime and the charged crime, the importance of the accused’s testimony, and the centrality of the credibility issue. *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

The supreme court has explained the rationale for permitting impeachment with felony convictions not involving dishonesty as follows:

Impeachment through prior convictions allows the fact-finder to make credibility determinations by seeing the whole person to judge better the truth of his testimony. We have noted that lack of trustworthiness may be evinced by the defendant’s abiding and repeated contempt for laws which he is legally and morally bound to obey. Under both our approach to Rule 609(a) and the common law tradition, it is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-finder about a witness’s credibility, at least with respect to convictions other than those involving dishonesty or false statements. In other words, *any* felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value.

State v. Hill, 801 N.W.2d 646, 651-52 (Minn. 2011) (quotations and citations omitted).

In ruling on the impeachment issue, the district court considered each of the relevant factors. The court determined that each prior conviction had impeachment value because, had Urena-Muro testified, the central issue would have been his credibility versus the credibility of the Walmart employee. The court noted that all of the convictions were “within the last six years” and occurred “almost annually.” The court concluded that the burglary and terroristic-threats crimes were similar to the crimes being tried and therefore would be referred to as unspecified felonies, in an effort to reduce potential prejudice. The court recognized that admission of the convictions could dissuade Urena-Muro from testifying and that the fourth factor therefore weighed against admission. Lastly, the court determined that credibility was a central issue as “there were only two people present.”

Urena-Muro argues that the district court did not “meaningfully” consider the convictions and failed to consider them independently. The record belies that argument. The district court heard arguments from both parties and explained its analysis of the relevant factors on the record. The district court discussed the prior convictions individually and as a whole. As a result of its consideration of the convictions individually, the district court ruled that although the state could impeach Urena-Muro with all of the convictions, the state could not refer to the offense type for two of the convictions.

Urena-Muro also points to the aggregate prejudicial effect of the convictions, but caselaw indicates that ongoing criminal activity has probative impeachment value. *See State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (indicating that repeated crimes may show a lack of trustworthiness).

In summary, “[a] district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Eason v. State*, 950 N.W.2d 258, 263 (Minn. 2020) (quotation omitted). We cannot say that either of those circumstances is present here. We therefore hold that the district court did not abuse its discretion in ruling on the state’s motion for impeachment under Minn. R. Evid. 609.

II.

Urena-Muro contends that the district court erred by failing to instruct the jury on the lesser-included offenses of simple robbery and fifth-degree assault. Urena-Muro did not request such an instruction. “[W]hen a defendant fails to request a lesser-included offense instruction warranted by the evidence, the defendant impliedly waives his or her right to receive the instruction.” *State v. Dahlin*, 695 N.W.2d 588, 597-98 (Minn. 2005). “Thus, absent plain error affecting a defendant’s substantial rights, a trial court does not err when it does not give a warranted lesser-included offense instruction if the defendant has impliedly . . . waived that instruction.” *Id.* at 598.

To obtain relief under the plain-error standard of review, a defendant must show that there was error, that the error was plain, and that the error affected his substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Error is plain if it is clear or obvious and not hypothetical or debatable. *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Generally, plain error is shown if it “contravenes case law, a rule, or a standard of conduct.” *State v. Hersi*, 763 N.W.2d 339, 344 (Minn. App. 2009) (quotation omitted). Error affects a defendant’s substantial rights when it deprives him of a fair trial. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn.

2008). If the three prongs of the plain-error test are met, this court then decides whether it should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

Courts must give a lesser-included offense instruction when “1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.” *Dahlin*, 695 N.W.2d at 598.

The state concedes that “simple robbery and fifth-degree assault are lesser included offenses of the charged crimes.” As to the state’s concession, first-degree aggravated robbery occurs when a person, “while committing a robbery,” is armed with a dangerous weapon or inflicts bodily harm. Minn. Stat. § 609.245, subd. 1 (2018). Simple robbery occurs when a person knowingly takes personal property from another and uses or threatens “force” to take the property. Minn. Stat. § 609.24 (2018). “[S]imple robbery is a lesser and included offense within the crime of aggravated robbery.” *State v. Oksanen*, 149 N.W.2d 27, 29 (Minn. 1967). Likewise, fifth-degree assault is a lesser-included offense of second-degree assault, which occurs when a person assaults another with a dangerous weapon. Minn. Stat. § 609.222, subd. 1 (2018); see Minn. Stat. § 609.04, subd. 1(1) (2018) (stating that lesser-included offenses include lesser degrees of the same crime).

It is not clear that the trial evidence provided a rational basis for acquitting Urena-Muro of the charged offenses and convicting him of the lesser-included offenses. See *Dahlin*, 695 N.W.2d at 598. The Walmart employee consistently testified that Urena-Muro slashed at her with a box cutter, cutting the cuff of her sweatshirt. She testified that she was “[o]ne hundred percent” certain that Urena-Muro used a silver box cutter during the

assault. Although the defense argued during closing argument that Urena-Muro did not possess a box cutter, no evidence supported that argument.

Moreover, a conviction for first-degree aggravated robbery may be obtained if the person committing the robbery has a dangerous weapon *or* “inflicts bodily harm.” Minn. Stat. § 609.245, subd. 1. The term “bodily harm” is defined as “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2018). Evidence—including the victim’s testimony—showed that the Walmart employee suffered pain or injury as a result of Urena-Muro’s punches. Thus, the evidence did not provide a rational basis for acquitting Urena-Muro of first-degree aggravated robbery and convicting him of simple robbery.

Lastly, Urena-Muro has not cited any authority that requires a district court to submit lesser-included instructions to a jury if the defendant does not request them. In *State v. Montermini*, this court rejected a claim of plain error because the appellant failed to cite authority “holding that the district court’s failure to sua sponte give an unrequested lesser-included-offense instruction is plain error.” 819 N.W.2d 447, 460 (Minn. App. 2012), *review denied* (Minn. Nov. 20, 2012).

In summary, it is not clear or obvious that the district court erred by failing to sua sponte instruct the jury regarding lesser-included offenses. Urena-Muro is therefore not entitled to relief under the plain-error standard.

III.

Urena-Muro challenges his sentence, arguing that the district court miscalculated his criminal-history score. “We review determinations of a defendant’s criminal history

score for abuse of discretion.” *State v. Strobel*, 921 N.W.2d 563, 573 (Minn. App. 2018) (quotation omitted), *aff’d*, 932 N.W.2d 303 (Minn. 2019).

“A defendant’s criminal-history score is calculated, in part, by allotting points for each of a defendant’s prior convictions for which a felony sentence was imposed.” *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009) (quotation omitted). The state has the burden to establish a defendant’s criminal history. *State v. Edmison*, 379 N.W.2d 85, 87 & n.1 (Minn. 1985). The state also has the burden to establish the proper classification of a prior offense for inclusion in a criminal-history score. *See Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018) (stating, in context of out-of-state offense classification, “[t]he State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score”).

Urena-Muro argues that the state did not prove that a 2012 fifth-degree drug-possession offense was properly assigned one-half of a felony point in his criminal-history score. He relies on the 2016 Drug Sentencing Reform Act (DSRA), which designated certain first-time fifth-degree drug-possession offenses as gross misdemeanors. 2016 Minn. Laws ch. 160, § 7; *Strobel*, 932 N.W.2d at 305. He argues that the state did not prove that his possession offense should be treated as a felony, and not a gross misdemeanor, when calculating his criminal-history score.

Because the underlying first-degree aggravated robbery occurred in December 2018, the 2018 Minnesota Sentencing Guidelines are applicable. *See State v. Scovel*, 916 N.W.2d 550, 559 (Minn. 2018) (holding that sentencing policies in effect at the time the

“current offense” was committed control in determining prior-offense criminal-history points). Under those guidelines, “The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions . . . and sentencing policies.” Minn. Sent. Guidelines 2.B.7.a. (2018). In this context, the supreme court has interpreted “offense definitions” to mean the element-based offense definitions in effect when the offense being sentenced was committed. *See Strobel*, 932 N.W.2d at 304, 306.

The issue presented here was addressed by this court in *Strobel*, in which we held that “a prior fifth-degree controlled-substance-possession offense may not be classified as a felony when calculating a criminal-history score to be used in sentencing a crime that occurred after the effective date of the [DSRA] . . . if the prior offense would qualify as a gross misdemeanor.” 921 N.W.2d at 576. “Because the state did not establish that Strobel’s 2012 fifth-degree controlled-substance conviction was properly classified as a felony,” we reversed the defendant’s sentence and remanded “with instructions permitting the state to develop the record regarding the type and amount of controlled substance underlying” the prior conviction. *Id.* at 577. The supreme court affirmed our decision. *Strobel*, 932 N.W.2d at 310.

Because the state in this case did not establish that Urena-Muro’s prior fifth-degree conviction was properly classified as a felony, *Strobel* supports a remand.

Urena-Muro next argues that the district court erred by including offenses that stemmed from single behavioral incidents in his criminal-history score. The underlying sentencing worksheet and presentence-investigation report indicate that Urena-Muro had

two related 2014 convictions for violating an order for protection and two related 2017 convictions for fleeing police in a motor vehicle. The record indicates that the district court included all four convictions in Urena-Muro's criminal-history score.

As a general rule, "the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing." Minn. Sent. Guidelines cmt. 2.B.101 (2018). But if an offender has "multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered." Minn. Sent. Guidelines cmt. 2.B.107 (2018). The term "single course of conduct" is equivalent to the term "single behavioral incident." Minn. Sent. Guidelines cmt. 2.B.116 (2018).

"Whether multiple offenses form part of a single behavioral act is a question of fact." *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). A determination of whether two intentional offenses arose from a single behavioral incident depends on whether the conduct shares a unity of time and place and "was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted). Moreover, the determination depends on "the particular facts and circumstances of each case." *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000).

The state argues that Urena-Muro cannot raise the single-behavioral-incident issue for the first time on appeal to this court. Specifically, the state argues that "case law makes clear that [Urena-Muro's] remedy lies not in an appeal, but in a petition for postconviction

relief or motion to correct sentence.” However, the state alternatively argues that if this court disagrees with its improper-forum argument, this court should “remand with instructions to allow the parties to develop the record about all relevant details of [Urena-Muro’s] criminal history.”

The state relies on this court’s reasoning in *State v. Yancy*, in which the court held that a criminal-history-score challenge based on a single-behavioral-incident theory must be raised in the district court at sentencing. No. A19-1695, 2020 WL 5359405, at *1-2 (Minn. App. Sept. 8, 2020).¹ However, the supreme court recently vacated this court’s opinion in *Yancy* and remanded the case back to this court for reconsideration in light of *Strobel*, 932 N.W.2d 303, *Scovel*, 916 N.W.2d 550, and *State v. Maurstad*, 733 N.W.2d 141 (Minn. 2007). *State v. Yancy*, No. A19-1695 (Minn. Nov. 25, 2020) (mem.). Those cases indicate that defendants may challenge their criminal-history scores for the first time on appeal. See, e.g., *Scovel*, 916 N.W.2d at 553 n.5 (“A defendant cannot forfeit appellate review of his criminal history score.”). We therefore allow the challenge here.

As to the merits, the underlying sentencing worksheet and presentence investigation suggest, at a minimum, that the relevant offenses share a unity of time and place. Indeed, the state does not argue otherwise. We therefore reverse Urena-Muro’s sentence and remand for the district court to recalculate his criminal-history score. On remand, the state should be allowed to present evidence regarding the proper classification of Urena-Muro’s

¹ Unpublished opinions “are not precedential.” Minn. Stat. § 480A.08, subd. 3(c) (2018); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009) (stating that an “unpublished Minnesota court of appeals decision does not constitute precedent”).

fifth-degree drug-possession offense and regarding the single-behavioral-incident issue. *See Strobel*, 921 N.W.2d at 577 (permitting the state “to develop the record regarding the type and amount of controlled substance underlying” the prior conviction); *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (remanding with similar instructions where the defendant “did not object to the district court’s determination that his out-of-state convictions were felonies”), *review denied* (Minn. July 15, 2008).

In conclusion, because Urena-Muro has not established that the district court erred in ruling on the state’s request for impeachment under Minn. R. Evid. 609 or in instructing the jury, we affirm Urena-Muro’s convictions. But we reverse his sentence for first-degree aggravated robbery and remand for recalculation of his criminal-history score and resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.