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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2039**

State of Minnesota,
Respondent,

vs.

Milo Calvin Ojohn,
Appellant.

**Filed February 1, 2021
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Lyon County District Court
File No. 42-CR-18-1311

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Marshall, 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; Johnson, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Milo Calvin Ojohn confined a woman in a hotel room for three days, during which time he repeatedly sexually and physically assaulted her. A Lyon County jury found him guilty of kidnapping, third-degree assault, and two counts of first-degree criminal sexual

conduct. We conclude that the district court did not plainly err by not giving the jury a specific-unanimity instruction. But we conclude that the district court erred by convicting and sentencing Ojohn on both count 2 and count 8, by assigning him two and one-half criminal-history points based on multiple prior convictions from the state of Colorado, and by imposing a lifetime term of conditional release. Therefore, we affirm in part, reverse in part, and remand for further proceedings, as described below in parts I, III, and IV.

FACTS

In early November 2018, Ojohn met M.E. at a bus depot in Denver, Colorado. They boarded the same bus traveling eastward. Both drank alcoholic beverages at the bus depot and on the bus. They got off the bus together in Marshall, Minnesota, obtained more alcoholic beverages, and rented a hotel room.

M.E. testified at trial as follows: After checking into their hotel room, Ojohn smoked methamphetamine. He told her that he “always carried,” which she understood to mean that he had a gun with him in the hotel room. Ojohn threw M.E. on the bed, choked her, and penetrated her vagina with his penis without her consent. M.E. was terrified because Ojohn was a “big guy.” For approximately 48 hours, Ojohn used force and threats of force to sexually assault her multiple times. He also punched her in the face and stomach, choked her, pulled out clumps of her hair, and told her that he would hunt her down and kill her if she left the hotel room.

On November 6, 2018, the day they were scheduled to check out, a hotel employee attempted to obtain payment for an additional night. M.E. went to the front desk to facilitate the payment and sought assistance from the hotel employee, who called the

police. When police officers searched the hotel room, they found numerous blood stains on the bed, blood on the wall, and a clump of hair on the bed with roots attached. M.E. was taken to a hospital, where she was treated for her injuries. An emergency-room physician testified at trial that M.E. had “signs of trauma with swelling . . . and bruising on her face” and “bruising on her wrists and ankles,” a fractured ankle, a fractured nasal bone, and a lung contusion. After Ojohn was arrested, he told a detective that all sexual conduct was consensual, that he hit M.E. on only one occasion after she hit him, and that all of her other injuries were caused by a seizure.

The state charged Ojohn with multiple offenses. In an amended complaint, the state charged Ojohn, in counts 1, 2, 3, 7, 8, and 9 with six counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342 (2018), for various acts on various dates and date ranges. In addition, the state charged Ojohn in count 4 with kidnapping, in violation of Minn. Stat. § 609.25, subd. 1(2) (2018); in count 5 with third-degree assault, in violation of Minn. Stat. § 609.223, subd. 1 (2018); and in count 6 with threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2018).

The case was tried to a jury on three days in July 2019. The jury found Ojohn guilty of the offenses charged in count 2 (first-degree criminal sexual conduct), count 4 (kidnapping), count 5 (third-degree assault), and count 8 (first-degree criminal sexual conduct). The district court imposed concurrent prison sentences of 201 months on count 2, 57 months on count 4, 24 months on count 5, and 360 months on count 8. The district court also imposed a ten-year term of conditional release on count 2 and a lifetime term of conditional release on count 8. Ojohn appeals.

DECISION

I. Multiple Convictions and Sentences

We begin by addressing Ojohn’s argument that the district court erred by convicting him and sentencing him on both count 2 and count 8, both of which alleged first-degree criminal sexual conduct. He contends that the state did not prove that the conduct underlying both convictions and sentences was not a single behavioral incident.

In general, a person “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2018). The statute includes a definition of the term “included offense.” *Id.* In determining whether an offense is an “included offense” for purposes of section 609.04, it is appropriate to examine “the elements of the offense instead of the facts of the particular case.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). This court applies a *de novo* standard of review to a district court’s application of section 609.04. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

Similarly, “if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2018). This statute “generally prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (quotation omitted). If there are two intentional crimes, “we determine whether the crimes were part of a single behavioral incident by considering (1) whether the offenses occurred at substantially the same time and place, and (2) whether the conduct was motivated by an

effort to obtain a single criminal objective.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (citations and quotations omitted). The state bears the burden of proving by a preponderance of the evidence that the conduct underlying multiple offenses was not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). This court applies a clear-error standard of review to a district court’s findings of fact and a *de novo* standard of review to a district court’s ultimate decision concerning multiple sentences. *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020).

Ojohn contends that the state did not prove that the conduct underlying the two convictions of and sentences for first-degree criminal sexual conduct was not a single behavioral incident. He explains that, in both counts, the state sought to prove that Ojohn penetrated M.E.’s vagina with his penis between November 4 and 6, 2018, but the amended complaint, jury instructions, and verdict forms do not describe the particular act underlying each count, and M.E.’s testimony was lacking in specifics about what occurred on the days in question. In response, the state agrees that the evidentiary record does not reveal separate behavioral incidents, and the state concedes that the district court erred by convicting and sentencing Ojohn on both count 2 and count 8.

The state’s concession is consistent with the caselaw. In *Bixby v. State*, 344 N.W.2d 390 (Minn. 1984), the defendant was convicted of two counts of third-degree criminal sexual conduct, but the supreme court held that “there was just one basic incident of wrongdoing that took place at two different locations in one evening.” *Id.* at 391-93. In *State v. Grampre*, 766 N.W.2d 347 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009), the defendant invaded a woman’s home and assaulted her in her bedroom, and this

court concluded that only one conviction of criminal sexual conduct was appropriate. *Id.* at 349, 354. The state’s concession also is consistent with the evidentiary record. M.E.’s testimony is lacking in specifics about which of the particular acts of criminal sexual conduct were committed on which dates. *See Barthman*, 938 N.W.2d at 266-67 (analyzing whether appellant was properly sentenced on two counts of criminal sexual conduct).

Thus, the district court erred by convicting and sentencing Ojohn on both count 2 and count 8. Therefore, we reverse and remand to the district court with instructions to vacate one of the two convictions. The finding of guilt on the count corresponding to the vacated conviction should remain intact but not adjudicated. *See State v. Walker*, 913 N.W.2d 463, 469 (Minn. App. 2018).

II. Unanimity Instruction

Ojohn also argues that the district court erred by not giving the jury a specific-unanimity instruction with respect to both count 2 and count 8. He argues that the absence of such an instruction, in combination with the manner in which the state charged the case and presented its evidence, violated his right to a unanimous verdict. We review Ojohn’s argument in light of our conclusion that he may not be convicted and sentenced on both count 2 and count 8. *See supra* part I. In light of that conclusion, the narrower question is whether his conviction on *either* count 2 or count 8 violated his right to a unanimous verdict.

The district court gave the jury a “general unanimity” instruction, as follows: “In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.” Ojohn argues that this instruction was

inadequate and that the jury should have been instructed that it must unanimously agree on the particular act for which it found Ojohn guilty. Ojohn acknowledges that he did not request a specific-unanimity instruction at trial and that we should review only for plain error. Under the plain-error test, we will not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Ojohn relies primarily on this court's opinion in *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001). In that opinion, we relied primarily on the United States Supreme Court's opinion in *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707 (1999), as well as opinions of several other state courts concerning a defendant's right to a unanimous verdict. *See Stempf*, 627 N.W.2d at 355-58. Since *Stempf*, the Minnesota Supreme Court has further developed the caselaw on this subject. In *State v. Crowsbreast*, 629 N.W.2d 433 (Minn. 2001), the court stated that the right to a unanimous verdict does not mean that "jurors should be required to agree upon a single means of commission" of a criminal offense. *Id.* at 439 (quoting *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 2497

(1991) (plurality opinion)). Rather, ““different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.”” *Id.* (quoting *Schad*, 501 U.S. at 631-32, 111 S. Ct. at 2497 (plurality opinion) (internal quotation omitted)); *see also State v. Ihle*, 640 N.W.2d 910, 917-19 (Minn. 2002).

In this case, the district court instructed the jury that, to find Ojohn guilty of the offense charged in count 2, it must find that (1) he “intentionally sexually penetrated” M.E.; (2) “the sexual penetration occurred without the consent of” M.E.; (3) “the defendant caused personal injury to” M.E.; (4) “the defendant used force or coercion to accomplish the act”; and (5) “the defendant’s act took place on or about November 4th through 6th, 2018.” The district court instructed the jury on count 8 in a similar manner except for the third element, which required proof that M.E. “had a reasonable fear of imminent great bodily harm to herself,” and the fourth element, which required proof that Ojohn “accomplished the act because [M.E.] had such a fear of imminent great bodily harm.”

Ojohn is correct in observing that, given the district court’s instructions, different jurors could determine that Ojohn is guilty based on different acts. But Ojohn’s right to a unanimous verdict would not be violated in that scenario. As stated above, the right to a unanimous verdict does not mean that ““jurors should be required to agree upon a single means of commission”” of a criminal offense. *Crowsbreast*, 629 N.W.2d at 439 (quoting *Schad*, 501 U.S. at 631-32, 111 S. Ct. at 2497 (plurality opinion)). Accordingly, this court has rejected Ojohn’s argument in similar circumstances. *See State v. Rucker*, 752 N.W.2d 538, 547-49 (Minn. App. 2008) (affirming convictions of first-degree and second-degree

criminal sexual conduct with respect to each of two different victims), *review denied* (Minn. Sept. 23, 2008).

Thus, the district court did not err, let alone plainly err, by not giving the jury a “specific unanimity” instruction.

III. Criminal-History Score

Ojohn also argues that the district court erred by assigning him 2.5 criminal-history points based on multiple prior convictions from the state of Colorado. There are two main components to Ojohn’s criminal-history score of 2.5. First, the district court assigned him 1.5 points for a 2013 Colorado felony conviction of “menacing.” Second, the district court assigned him 1.0 point for five prior Colorado convictions that are equivalent to Minnesota misdemeanors. Ojohn challenges the assignment of both 1.5 points for the Colorado menacing conviction and 1.0 point for the Colorado misdemeanor convictions.

A. 1.5 Points for Menacing Conviction

The district court assigned Ojohn 1.5 points for this prior conviction by reasoning that it is equivalent to the Minnesota felony offense of second-degree assault, which has a severity level of 6. *See* Minn. Sent. Guidelines 2.B.5; 5.B (2018).

In determining whether to assign criminal-history points for a prior out-of-state conviction, a district court first should identify “the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense” and then assign criminal-history points accordingly. Minn. Sent. Guidelines 2.B.5.b. A district court should identify the equivalent Minnesota offense by considering whether the out-of-state offense “is defined as a felony, gross misdemeanor, or targeted misdemeanor in Minnesota” and “the sentence

imposed.” *Id.* The district court should seek to “comply with the sentencing guidelines’ mandate that the court determine how the offender would have been sentenced had the 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). This court applies an abuse-of-discretion standard of review to a district court’s assignment of criminal-history points based on out-of-state convictions. *Id.*

In Colorado, a defendant may be found guilty of menacing if he placed or attempted “to place another person in fear of imminent serious bodily injury.” Colo. Rev. Stat. § 18-3-206(1) (2018). Menacing ordinarily is a misdemeanor offense, but it is a felony offense if the defendant placed the other person in fear by “the use of a deadly weapon” or by “representing verbally or otherwise that he or she is armed with a deadly weapon.” *Id.*, § 18-3-206(1)(a)-(b). In this case, the record indicates that Ojohn was convicted of felony menacing, which implies that he used a deadly weapon or represented that he was armed with a deadly weapon. In Minnesota, a defendant commits second-degree assault if he “assaults another with a dangerous weapon.” Minn. Stat. § 609.222, subd. 1 (2018). “Assault” is defined to include “an act done with intent to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.02, subd. 10(1) (2018). Based on these similarities, the district court did not abuse its discretion by determining that Ojohn’s prior Colorado conviction of menacing is equivalent to the Minnesota felony offense of second-degree assault.

Ojohn contends that the two offenses are not equivalent on the ground that the Colorado offense of felony menacing is not a specific-intent crime, while the Minnesota

offense of second-degree assault is a specific-intent crime. The state disagrees, contending that the *mens rea* requirements for the two statutes are equivalent. Ojohn has not cited any caselaw for the proposition that a district court must compare the *mens rea* requirements of an out-of-state offense and a Minnesota offense. In any event, the state has effectively demonstrated that Colorado law and Minnesota law are equivalent with respect to the *mens rea* requirements of the two offenses. *Compare* Colo. Rev. Stat. § 18-1-501(6) (2018); *People v. Crump*, 769 P.2d 496, 497 (Colo. 1989), with *State v. Fleck*, 810 N.W.2d 303, 312 (Minn. 2012); *State v. Hough*, 585 N.W.2d 393, 396-97 (Minn. 1998); *Linert v. MacDonald*, 901 N.W.2d 664, 668-69 (Minn. App. 2017). Any difference between the *mens rea* requirements is not significant enough to compel the conclusion that the district court abused its discretion by determining that the two offenses are equivalent.

Thus, the district court did not err by assigning Ojohn 1.5 criminal-history points for Ojohn’s prior Colorado felony conviction of “menacing.”

B. 1.0 Point for Non-Felony Convictions

The district court assigned Ojohn 1.0 point for five prior Colorado convictions on the ground that they are equivalent to Minnesota gross misdemeanors or misdemeanors. Prior convictions of gross misdemeanor or misdemeanor offenses “count as units comprising criminal history points,” four of which “equal one criminal history point.” Minn. Sent. Guidelines 2.B.3.

1. Prior Non-Felony Conviction of Criminal Impersonation

One of Ojohn’s five prior Colorado non-felony convictions was a conviction of criminal impersonation. A person commits criminal impersonation in Colorado if he

“[a]ssumes a false or fictitious identity or capacity, legal or other, and in such identity or capacity he or she . . . performs any other act with intent to unlawfully gain a benefit . . . or to injure or defraud another.” Colo. Rev. Stat. § 18-5-113, subd. 1(b)(ii) (2018). The district court determined that this offense is equivalent to the Minnesota offense of giving a false name to a police officer. A person commits that offense in Minnesota if he “gives a fictitious name other than a nickname, or gives a false date of birth, or false or fraudulently altered identification card to a peace officer, . . . when that officer makes inquiries incident to a lawful investigatory stop or lawful arrest, or inquiries incident to executing any other duty imposed by law.” Minn. Stat. § 609.506, subd. 1 (2018).

Ojohn contends that the two offenses are not equivalent because a person may commit the Colorado offense by giving a false identity to anyone, not just a police officer, and by doing so at times other than when there is a lawful investigatory stop or arrest. The state concedes this point. But the state contends that Ojohn is not entitled to relief on appeal because he did not object to, and in fact agreed to, the assignment of a unit to his prior Colorado conviction of criminal impersonation. In reply, Ojohn contends that a defendant cannot waive an issue concerning the calculation of a criminal-history score, and he cites *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007), in support of that contention.

At sentencing, the state bears the burden of proving the facts necessary to justify including out-of-state convictions in the calculation of a defendant’s criminal-history score. *Williams v. State*, 910 N.W.2d 736, 743 (Minn. 2018). A defendant may argue on appeal that the state did not satisfy that burden, even if the defendant did not challenge the evidence in the district court. *See Maurstad*, 733 N.W.2d at 148. If a defendant makes

such an argument, this court must examine the record to determine whether it contains evidence supporting the district court's calculation of criminal-history points. *See State v. Maley*, 714 N.W.2d 708, 711-12 (Minn. App. 2006). If the evidence is lacking due to inadequate development of the record and the lack of an objection, the appropriate appellate remedy is for this court to reverse and remand to the district court for further development of the record and resentencing. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. May 6, 2008).

In this case, it appears that the state did not introduce any evidence of Ojohn's prior Colorado non-felony conviction of criminal impersonation. Thus, the district court erred by relying in part on Ojohn's prior Colorado non-felony conviction of criminal impersonation when assigning one criminal-history point for all of Ojohn's prior Colorado non-felony convictions.

2. *Four Other Prior Non-Felony Convictions*

It appears that the district court implicitly adopted the probation officer's sentencing worksheet, which identified five prior non-felony Colorado convictions, including a 2010 conviction of menacing, a 2010 conviction of driving under the influence, a 2010 conviction of motor-vehicle theft, and a 2015 conviction of third-degree assault. Each of these non-felony convictions was counted as one unit, thereby supporting the assignment of one criminal-history point.

Ojohn contends that the district court erred by relying on these four prior convictions on the ground that the state did not introduce any evidence into the record to satisfy its burden of proof. Ojohn seeks a remand, at which the state would have the opportunity to

introduce evidence of the prior convictions. In response, the state contends that Ojohn is not entitled to appellate relief because he has not asserted that he does not actually have the four prior convictions at issue. In reply, Ojohn contends that a defendant cannot waive an issue concerning the calculation of a criminal-history score and cites unpublished opinions in which this court has reversed and remanded in similar circumstances.

As stated above, the state bears the burden of proving the facts necessary for a calculation of a defendant's criminal-history score. *Williams*, 910 N.W.2d at 743. A defendant does not waive or forfeit an argument concerning criminal-history points by not making it in the district court. *Maurstad*, 733 N.W.2d at 148. If there is no evidence in the record to support the district court's reliance on a prior conviction, it is appropriate for this court to remand for further proceedings. *Outlaw*, 748 N.W.2d at 356.

In this case, it appears that the state did not introduce any evidence of Ojohn's four other prior Colorado non-felony convictions. Thus, the district court erred by relying in part on those prior convictions when assigning one criminal-history point for Ojohn's non-felony convictions. Therefore, we reverse the district court's calculation of criminal-history points and remand for further proceedings, with instructions to give the state an opportunity to introduce evidence concerning Ojohn's prior Colorado non-felony convictions.

IV. Conditional Release

Ojohn last argues that the district court erred by imposing a lifetime term of conditional release on count 8 because his conviction on count 2 should not be considered a qualifying prior sex-offense conviction.

A district court must impose a lifetime term of conditional release if a defendant is being sentenced for first-degree criminal sexual conduct and “has a previous or prior sex offense conviction.” Minn. Stat. § 609.3455, subd. 7(b) (2018); *see also State v. Nodes*, 863 N.W.2d 77, 82 (Minn. 2015). Ojohn contends that, if this court were to grant him relief with respect to either his conviction on count 2 or his conviction on count 8, he would not have a prior sex-offense conviction. Indeed, we have concluded that Ojohn cannot be convicted of and sentenced on both count 2 and count 8, and we are remanding for vacatur of one of those convictions and for resentencing. *See supra* part I. Consequently, Ojohn can be convicted of only one sex offense in this case, which means that there can be no prior sex-offense conviction. The state agrees.

Thus, the district court erred by imposing a lifetime term of conditional release. On remand, the district court shall resentence Ojohn without imposing a lifetime term of conditional release.

Affirmed in part, reversed in part, and remanded.

A handwritten signature in cursive script, appearing to read "Matthew J. Johnson".