

*This opinion is nonprecedential except as provided by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
A20-0717**

State of Minnesota,
Respondent,

vs.

Alvin Perkins,
Appellant.

**Filed April 5, 2021
Affirmed in part, reversed in part, and remanded
Kirk, Judge***

St. Louis County District Court
File No. 69DU-CR-19-178

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Kirk, Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

On direct appeal from his conviction for first-degree criminal sexual conduct, appellant Alvin Perkins challenges his conviction, arguing that respondent State of Minnesota committed prosecutorial misconduct during closing argument. Appellant also challenges his sentence, arguing that he is entitled to a shorter sentence based on changes to the sentencing guidelines. Appellant asserts an additional argument in his pro se supplemental brief. Because appellant may be entitled to a shorter sentence based on changes to the sentencing guidelines, we affirm in part, reverse in part, and remand to the district court for resentencing consistent with this opinion.

FACTS

One night in August 2013, C.N. went out drinking with her friend. C.N. does not remember all of the details of what happened that night, but testified that she talked to appellant and then went to his friend's apartment. At the apartment, C.N. took seven to eight pills that "put [her] to sleep." C.N. testified that she blacked out, and that she woke up to appellant holding her legs and penetrating her rectum with his penis.

The day after the assault, C.N. underwent a sexual assault examination. C.N. had bruising on her arms as well as early signs of bruising on the inside of her thighs. The nurse recovered from C.N.'s body two pubic hairs that did not belong to C.N. Semen was found in C.N.'s vagina, rectum, and around her perineal area.

In 2017, an investigator interviewed C.N. and used her description of where the assault took place to locate the apartment and ultimately, appellant. A DNA sample was

obtained from appellant. Based on the semen obtained from C.N.'s sexual assault examination, appellant could not be excluded as a contributor to the two-person mixture on the three swabs, while 99.99% of the general population could be excluded as contributors to that mixture.

After trial, the jury found appellant guilty of both counts. The district court convicted appellant of one count and sentenced him to a presumptive sentence of 306 months in prison.

DECISION

I. The prosecutor did not commit prosecutorial misconduct during closing arguments.

Appellant argues that he is entitled to a new trial because the prosecutor committed prejudicial misconduct that impacted his substantial rights. Appellant contends that the prosecutor committed misconduct by encouraging the jury to punish him for exercising his right to a trial and by inflaming the passions and prejudices of the jury. Appellant admits that he did not object to any of the alleged misconduct at trial, but he nonetheless asserts that the prosecutor's unobjected-to misconduct constitutes plain error. We have thoroughly reviewed the record and there is no support for appellant's argument that the state committed prosecutorial misconduct. *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010) (describing plain error).

II. Appellant is entitled to a reduced criminal-history score based on the changes to the sentencing guidelines.

The district court sentenced appellant to a bottom-of-the-box sentence of 306 months in prison. This sentence was based on appellant's criminal-history score of six,

which included a custody-status point of one. Appellant requests resentencing, arguing that he is entitled to the benefit of a recent revision to the Minnesota Sentencing Guidelines, which would reduce the custody-status point to one-half point. A party may raise an issue regarding a criminal-history score even if the party did not raise the issue with the district court. *See State v. Strobel*, 932 N.W.2d 303, 305-06 (Minn. 2019).

Under the sentencing guidelines at the time of his offense, one custody-status point was assigned if “[t]he offender was under . . . release pending sentencing.” Minn. Sent. Guidelines 2.B.2.a.(1)(v) (2012). Appellant states that his custody-status point was assigned under this provision because the offense at issue in this appeal occurred during his sentencing following a 2014 attempted-sale-of-a-simulated-substance conviction.

Under the 2019 amended sentencing guidelines, an offender is assigned one-half of a custody-status point if the offender was “release[d] pending sentencing” for “a felony currently assigned a severity level ranking . . . [of] D1 or D2 on the Drug Offender Grid.” *See* Minn. Sent. Guidelines 2.B.2.a.(3)(i) (Supp. 2019). Appellant claims that he should receive the benefit of this change, reducing his 306-month sentence to a 261-month sentence overall, which is the bottom of the box for someone with a criminal-history score of five.

Appellant argues that he is entitled to relief under the amelioration doctrine. Under that doctrine, a defendant is entitled to the sentencing benefits of later amendments to the criminal law—including the sentencing guidelines—that mitigate punishment, so long as final judgment has not been reached. *State v. Kirby*, 899 N.W.2d 485, 489, 491-94 (Minn. 2017). The amelioration doctrine applies to crimes committed before an amendment’s

effective date if “(1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered when the amendment takes effect.” *State v. Otto*, 899 N.W.2d 501, 503 (Minn. 2017).¹

The only dispute here is condition one: whether the legislature clearly stated its intent to abrogate the amelioration doctrine in connection with the 2019 amendments, a question we answered in *State v. Robinette*, 944 N.W.2d 242 (Minn. App. 2020), *review granted* (Minn. June 30, 2020) (discussing whether the amended sentencing guidelines reduces a custody-status point for an offender discharged from probation). We concluded that there is no statement by the legislature clearly establishing its intent to abrogate the amelioration doctrine and that the amelioration doctrine must apply in this context. *Id.* at 251.

We remand to the district court to use its discretion to resentence appellant anywhere between 261 months and 306 months. Three hundred six months is actually the presumptive middle-of-the-range sentence for an offender with a criminal-history score of five points, but since the district court chose to use the bottom of the box in its initial sentence, we send this back to the district court to determine whether to sentence below this now-presumptive sentence of 306 months.

¹ Although the state does not address whether conditions two and three are met, the record reflects that they are met here. The change to the sentencing guidelines would mitigate appellant’s punishment by reducing his criminal-history score, and appellant’s judgment was not final because his case was ongoing at the time of the amendment.

III. Appellant's pro se argument fails.

Appellant argues that the district court erroneously excluded a 2018 police report that C.N. made of a physical and sexual assault against her by another person that was investigated but not charged. We have considered appellant's claim and determined it lacks merit. A sexual assault report that is filed but never charged does not go to truthfulness and, in any event, the district court is in the best position decide evidentiary matters. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014) ("Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion."). Appellant's argument thus fails.

Affirmed in part, reversed in part, and remanded.