STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0691

State of Minnesota,
Respondent,

vs.

James Darnell Posey,
Appellant.

Filed February 6, 2023
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge[*]

Ramsey County District Court
File No. 62-CR-21-1040

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

John J. Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Gaïtas, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant challenges his sentence following a domestic-assault conviction, arguing that the district court denied his right to be present at sentencing and erred in assigning him criminal-history points for an Illinois conviction. Appellant raises additional challenges in a pro se supplemental brief. Because the district court did not violate appellant's right to be present, we affirm in part. But because the state failed to offer sufficient evidence that appellant's Illinois conviction had not decayed, we reverse in part and remand for resentencing. On remand, the state shall be given an opportunity to offer additional evidence to prove that the Illinois conviction had not decayed.

FACTS

In February 2021, the state charged appellant James Darnell Posey with felony domestic assault, alleging that he punched his girlfriend. Posey pleaded guilty to the charge with the understanding that the state would recommend a dispositional departure. Per the agreement, Posey was to remain law-abiding, cooperate with the presentence investigation (PSI), and appear for sentencing.

Posey failed to schedule a PSI, failed to appear for sentencing, and was charged with new offenses, including violation of a domestic-abuse no-contact order (DANCO). Posey was taken into custody and completed a PSI in December 2021.

The PSI recommended a 27-month sentence based on Posey's criminal-history score, which consisted of five and one-half felony points, including one and one-half points for a 2005 Illinois conviction. According to the PSI, Posey indicated that he would

"execute his sentence" if the DANCO protecting his girlfriend was maintained. He told the probation officer: "If there is a DANCO, I'll be in prison. I will not let nobody or nothing dictate who I can or can't be with." Posey also told the probation officer: "I don't like authority and I'm going to smoke weed. I don't like people telling me what I have to do."

In March 2022, the district court held a remote sentencing hearing via Zoom. The defense requested a dispositional departure in accordance with the plea agreement. The state asked the district court to discard the plea agreement and impose a guidelines sentence.

The district court allowed Posey to address the district court on the sentencing issue. The district court asked Posey about his statement that he would rather execute his sentence than have a DANCO in place. The district court also sought to ascertain Posey's amenability to probation in light of his PSI statements and new charges. During the exchange between Posey and the district court, Posey interrupted the district court several times, and the district court told him to "be quiet." The district court then took a 15-minute recess to consider the departure issue.

Following the recess, the district court again let Posey speak on the sentencing issue. The district court granted the dispositional departure, stayed execution of Posey's sentence, and placed Posey on probation for four years. The district court then discussed the terms of Posey's probation, and the following exchange occurred:

> DISTRICT COURT: There is a no contact order. You are to have absolutely no contact directly, indirectly, through others,

in person, in writing, by telephone, electronically or by any other means, with the victim in this case.

POSEY: How long?

DISTRICT COURT: What?

POSEY: How long?

DISTRICT COURT: While you are on probation.

POSEY: Four years?

DISTRICT COURT: Damn right. . . .

POSEY: C'mon . . . . See, c'mon, man, that ain't fair.

DISTRICT COURT: Okay. All right.

POSEY: It's cool. It's cool. I got to do what you say, but that ain't fair, that you would do that to me for four years.

DISTRICT COURT: You better be quiet. Don't say another word or this is going to go south really quick. I will give you a choice: We can not have that no contact order and you do the 30-month sentence that I just laid out. You have a choice there. I will let you choose. No contact for 30 months. What's it going to be? You can have all the contact you want—

POSEY: That's wrong that you would even make me have to make this choice like that, man. That's wrong. You're going to take me away from somebody that I care about just for punishment, man. It's cool—

DISTRICT COURT: [M]ute him. I am not going to put him on probation. I am going to execute this sentence because he already made clear in the PSI that he was—that he was going to go to prison if there's a DANCO, and now he's just made [it] clear again.

So, what I am going to do is we're going to change that. . . . I am not going to make it 30 months. I am going to make it 27; 18 months in prison, 9 months on supervised

> release. He is entitled to custody credit of 106 days. We are going to give his victim some peace of mind for a few months. . . .
>
> All right. Mr. Posey, let the deputies know we're done. Let them know we're done. You got nothing else to say. We're done.

The district court sentenced Posey to 27 months in prison. This appeal follows.

DECISION

I.

Posey asserts that the district court, by muting his audio "without justification or prior warning," violated his right to be present at sentencing.

Under the Sixth and Fourteenth Amendments, a defendant has a right to be present at trial. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005); *State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001). Additionally, Minn. R. Crim. P. 26.03, subd. 1, requires a defendant's presence at every stage of trial, including sentencing,[1] although a defendant may waive his right by absenting himself or, after warning, engaging in conduct that justifies exclusion. *Gillam*, 629 N.W.2d at 450-51 (citing Minn. R. Crim. P. 26.03, subd. 1(2)).

We review a district court's decision to proceed with a stage of trial outside the defendant's presence for an abuse of discretion. *Id.* at 450. "[I]f a defendant is wrongly denied the right to be present, the defendant is not entitled to relief if it can be said that the error was harmless error beyond a reasonable doubt." *Ware*, 498 N.W.2d at 457-58.

[1] The supreme court has stated that the rights under rule 26.03 are broader than the rights bestowed under the Constitution. *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993).

As a threshold matter, the parties dispute whether muting Posey resulted in him not being "present." The state argues that Posey was physically present at sentencing and that Posey's "real claim is not a violation of his right to be present, but a purported violation of his right to allocution." We agree.

In *United States v. Braman*, the Eighth Circuit considered a case in which the defendant was muted twice during a videoconference sentencing hearing. 33 F.4th 475, 478 (8th Cir. 2022). The defendant provided a short allocution after arguments from counsel. *Id.* The defendant then interrupted the district court. *Id.* The district court muted the defendant and told him that he would have an opportunity to speak later. *Id.* When the district court later gave the defendant an opportunity to speak, the defendant made statements about the victim, and the district court again muted the defendant. *Id.* On appeal, the defendant argued that "the district court committed plain and structural error violating his Sixth Amendment right to counsel and his right to meaningful allocution, when he was muted twice during the sentencing hearing." *Id.* The Eighth Circuit found that the "novel contention" was "without merit" because the defendant *was present for sentencing*, the defendant failed to explain how his right to confer with counsel was violated, a defendant's role at sentencing is limited, there were no Confrontation Clause issues, and the defendant was provided an opportunity to give a meaningful allocution. *Id.* at 478-80.

This court is not bound by Eighth Circuit precedent, but such cases may be persuasive. *Regner v. Nw. Airlines, Inc.*, 652 N.W.2d 557, 563 (Minn. App. 2002). Based on *Braman*, and the circumstances of this case, we conclude that Posey was present for

sentencing. The district court muted Posey after he had been given the opportunity for meaningful allocution, and Posey was muted while the judge was handing down the sentence, a stage of sentencing when Posey would not be expected to speak. The district court was permitted to compel Posey's silence at that stage of the proceeding. District courts "are vested with broad discretion in deciding matters of courtroom procedure." *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001).

Even if Posey's right to be present was violated, any error was harmless beyond a reasonable doubt. Again, Posey was muted while the judge was sentencing him, and there was therefore no further need for argument or persuasion. As the judge stated after imposing the sentence: "You got nothing else to say. We're done." Posey asserts that the district court was "clearly on the fence," and he argues that he could have persuaded the judge to depart had he been given the opportunity to speak. But Posey had already been given ample time to speak when the judge muted him and changed the sentence. Posey's arguments did not help his case. He effectively persuaded the judge to impose a prison term.

Posey's right to be present was not violated, and any error in muting Posey at the end of the sentencing hearing was harmless beyond a reasonable doubt.

II.

Posey claims that the district court abused its discretion by assigning him one and one-half criminal-history points for his 2005 Illinois conviction because the state failed to prove that the conviction had "not decayed." The state argues that the PSI contains

sufficient information to prove that the Illinois conviction resulted in an executed prison sentence, and therefore the sentence had not decayed.

A sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). But the district court's determination of a defendant's criminal-history score will only be reversed for an abuse of discretion. *State v. Roloff*, 562 N.W.2d 29, 30 (Minn. App. 1997).

The sentencing guidelines allow out-of-state felony convictions to be included in a defendant's criminal-history score. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). However, felony convictions that have decayed must not be used in calculating a defendant's criminal-history score. Under the sentencing guidelines, in computing criminal-history score:

> a prior felony sentence or stay of imposition following a felony conviction must not be used if all the following, to the extent applicable, occurred before the date of the current offense:
>
> (1) the prior felony sentence or stay of imposition expired or was discharged;
>
> (2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and
>
> (3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

Minn. Sent'g Guidelines 2.B.1.c. (2020).

The state bears the burden of establishing the facts necessary for the inclusion of out-of-state convictions in the defendant's criminal-history score. *Maley*, 714 N.W.2d at 711. "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." *Id.*

Here, the only evidence on the out-of-state conviction came from the PSI, which contained the following information: "Cook County, IL. Pled guilty 9/9/05 and sentenced to 4 years Illinois DOC, credit 264 days. Supervised release 6/15/06. Discharged 6/15/08. (04-CR-2881501). Severity Level D6- 1.5 Points[.]"[2]

The state concedes that if Posey "received a probationary sentence on September 9, 2005[,] and was never sent to prison for the Illinois conviction, then the conviction has decayed." The state further concedes that the PSI is the only source of evidence on whether Posey was sent to prison for the conviction. However, the state argues that the PSI provides sufficient evidence that the sentence was executed because it mentioned Posey being sentenced to the Illinois "DOC" and placed on supervised release. We disagree. The PSI provided insufficient evidence that Posey received an executed sentence and that his 2005 Illinois conviction had therefore not decayed.

As noted by the state, the PSI suggests, by referencing the DOC and supervised release, that Posey's sentence was executed. Indeed, the PSI specifically states that Posey was "[d]ischarged" in June 2008, less than 15 years from the date of the "current" offense. However, there was no testimony or additional documentation to confirm that the sentence was executed, and this court has suggested that such evidence is needed. *See Maley*, 714

[2] In the PSI, probation noted that the "matter is a Class 1 Felony in IL" and "is being treated as the MN equivalent of Controlled Substance Crime in the 3rd Degree M.S. 152.023, given the drug amount is unknown, other than that it is between 1 and 15 grams."

N.W.2d at 711. To meet its burden, the state does not need to provide certified copies of an out-of-state conviction, but it must provide evidence sufficient under Minn. R. Evid. 1005 that proves the validity of the conviction. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). Minn. R. Evid. 1005 states:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with [r]ule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

In accordance with *Griffin* and rule 1005, the district court can "rely on persuasive evidence that sufficiently substitutes for the official, certified record of conviction." *Maley*, 714 N.W.2d at 712. In *Griffin*, the supreme court concluded that the state met its burden by submitting "considerable documentation" that the defendant had been convicted of an out-of-state offense, even though it did not submit a certified copy of the conviction. 336 N.W.2d at 525. In another case, *State v. Jackson*, the state provided sufficient evidence of an out-of-state conviction based only on the unsworn "advice and testimony" of a probation officer during sentencing. 358 N.W.2d 681, 682-83 (Minn. App. 1984). In contrast, the state did not meet its burden in *Maley* when it listed the out-of-state convictions on the sentencing worksheet but provided no documents or evidence admissible under rule 1005 to prove the convictions. 714 N.W.2d at 710, 712.

Here, the PSI report suggests that the sentence was executed, but it does not say so definitively, and there was no testimony or additional documentation to support the state's

assertion that the sentence was executed. Under these circumstances, the state failed to meet its burden to show that the conviction had not decayed. We therefore reverse Posey's sentence and remand for resentencing.

Posey failed to object at sentencing to the inclusion of the 2005 Illinois conviction in his criminal-history score. On remand, the state is therefore permitted to submit additional evidence to the district court to prove that the 2005 Illinois conviction had not decayed. *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (reaching a similar conclusion), *rev. denied* (Minn. July 15, 2008)

III.

In his pro se supplemental brief, Posey argues that he should not have received a felony criminal-history point for a 2013 conviction for violation of an order for protection (OFP). The documents accompanying Posey's brief show that the conviction was for a violation of Minn. Stat. § 518B.01, subd. 14(a) (2012). The PSI indicates that Posey received one criminal-history point for the felony OFP violation.

Posey argues that violation of an OFP is not a criminal matter and that such actions are resolved "in family court." He is incorrect. *See* Minn. Stat. § 518B.01, subd. 14 (2012) (setting forth criminal penalties for OFP violations). He also contends that his OFP violation should not have been a felony because it was his "first OFP violation." But enhancement under the OFP statute is not limited to prior OFP violations.

Under the statute, a person commits a felony OFP violation if the person violates an OFP "within ten years of the first of two or more previous *qualified domestic violence-related offense convictions* or adjudications of delinquency." Minn. Stat. § 518B.01,

subd. 14(d)(1) (emphasis added). Qualified domestic violence-related offenses are defined under Minn. Stat. § 609.02, subd 16 (2012), and include a multitude of offenses, not just OFP violations. Minn. Stat. § 518B.01, subd. 2(c) (2012). Indeed, Posey's PSI indicates that he was convicted of DANCO violations in 2012, terroristic threats in 2011, and domestic assault in 2010, all of which seemingly qualify for purposes of enhancement. In sum, Posey's pro se arguments are unavailing.

We affirm Posey's sentence in part because his right to be present at sentencing was not violated, and regardless, any error was harmless. But because the state failed to offer sufficient evidence that Posey's 2005 Illinois conviction had not decayed, we reverse in part and remand for resentencing. On remand, the state shall have the opportunity to prove, by testimony or additional documentation, that the 2005 Illinois conviction had not decayed. *See Outlaw*, 748 N.W.2d at 356. If it is ultimately determined by the district court that the Illinois conviction had decayed, Posey must be resentenced under the correct criminal-history score.

Affirmed in part, reversed in part, and remanded.