

*This opinion is nonprecedential except as provided by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
A23-0482**

State of Minnesota,
Respondent,

vs.

Richard Eugene Ball, Sr.,
Appellant.

**Filed August 26, 2024
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Stearns County District Court
File No. 73-CR-22-5410

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Bjorkman, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from final judgment, appellant argues that his conviction for felony domestic assault must be reversed because the district court prejudicially erred by allowing the state to introduce a witness' hearsay statement pursuant to Minn. R. Evid. 807.

Additionally, appellant argues that this court must reverse his career-offender sentence because he does not have five qualifying convictions. Because admission of the hearsay statement was harmless, we affirm in part. However, because respondent did not prove the requisite five qualifying prior convictions, his career-offender sentence was impermissible and so we reverse in part and remand for resentencing.

FACTS

Following a July 4, 2022 incident, respondent State of Minnesota charged appellant Richard Eugene Ball Sr. with felony threats of violence in violation of Minn. Stat. § 609.713, subd. 1 (2020) and felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2020).

At trial, the state presented testimony from the victim (L.I.), the victim's coworker (B.E.), three officers who responded on July 4, and an expert on domestic violence. The state also played a 911 call from a different coworker of the victim (L.T.). The following facts are derived from the jury trial.

Ball and L.I. met in 2010 in Nevada and were married in 2012. They divorced in 2016 but continued to have an intermittent relationship. Throughout the relationship, Ball committed violent acts against L.I. In 2017, Ball and L.I. moved to Minnesota. After a violent incident in 2019, L.I. ended her relationship with Ball and moved to a different state.

In June 2022, L.I. returned to Minnesota and moved into a motel where she began to work, and Ball and L.I. resumed their relationship. But before the July 4 incident, L.I. told Ball not to visit her at the motel and stopped responding to his calls and text messages.

On July 4, Ball went to the motel and found L.I. in the laundry room. L.I. testified that, in the laundry room, Ball told L.I. that if she did not tell him whether she still wanted to be with him, he would kill her. Later that day, Ball found L.I. cleaning a guest's room. In the room, Ball poked L.I. in the head and threatened her.

After the incidents in the motel room, L.I.'s coworkers, B.E. and L.T., saw Ball in the motel parking lot. B.E. reminded Ball that he was not supposed to be at the motel. In a recorded statement to law enforcement, B.E. said that Ball responded by pulling out a black pistol from his waistband and pointed it at the vehicle in which B.E. was driving.

L.I.'s other coworker, L.T., called 911 and reported that Ball was on the property and refused to leave. She then told the dispatcher that Ball was coming towards them and that he had a black gun in his right hand. Police officers detained Ball and searched him. They found a small, black folding knife in one of his pockets, but they did not locate a firearm.

During his testimony, B.E. contradicted his earlier statement that he had seen a gun. Although B.E. admitted that he had told the police officer that he had seen a gun, B.E. testified that he was not sure whether the object he saw was a gun. He testified that he had seen Ball take a black object out of his waistband and hold it at his side. The state moved to introduce B.E.'s recorded statement to police pursuant to the residual hearsay exception. Over Ball's objection, the district court admitted the statement and the recording was played for the jury.

The jury found Ball not guilty of making threats of violence but guilty of domestic assault.

Prior to sentencing, the state moved to seek an aggravated sentence, arguing that Ball qualified as a career offender. Ball waived his right to have a jury determine whether the state had proved the facts supporting an aggravated sentence, and the district court held an evidentiary hearing on the state's motion. The district court found that Ball had committed five previous felonies, including one in California and one in Nevada, and that Ball had committed the domestic assault on July 4 as part of a pattern of criminal conduct. The district court determined that Ball was a career offender and, for the felony domestic-assault conviction, sentenced Ball to 60 months' imprisonment, an upward durational departure from the sentencing guidelines presumptive range.

Ball appealed. We granted his request to stay his appeal to file a petition for postconviction relief in district court contesting his qualification to be sentenced pursuant to the career-offender statute. By agreement of the parties, no additional evidence was presented to the postconviction court regarding his petition though the parties submitted written arguments. The postconviction court denied Ball's petition, concluding that the state had proved the requisite five convictions and that the current felony was committed as part of a pattern of criminal conduct. We reinstated Ball's appeal.

DECISION

I. Any error in admitting the hearsay statement of B.E. was harmless.

Ball argues that the district court abused its discretion by admitting the recording of B.E.'s statement to police in which B.E. stated that Ball pointed a gun at the vehicle he was driving, contending that it was improperly admitted pursuant to the residual hearsay exception and its admission was prejudicial.

Appellate courts review the admission of a hearsay statement pursuant to an exception to the hearsay rule for abuse of discretion. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). “A defendant claiming error in the district court’s reception of evidence has the burden of showing both the error and the prejudice resulting from the error.” *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009) (quotation omitted).

“Hearsay” is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay is inadmissible unless it falls into a listed exception. Minn. R. Evid. 802. B.E.’s statement was admitted pursuant to the residual exception to the hearsay rule, which provides:

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807.

Ball challenges each prong of the residual exception. But we need not determine whether the district court abused its discretion by admitting the evidence because, even if we assume error, Ball has not shown that the statement substantially impacted the jury’s verdict.

An error is harmless “[w]hen there is no reasonable possibility that it substantially influenced the jury’s decision.” *State v. Harvey*, 932 N.W.2d 792, 810 (Minn. 2019)

(quotation and citation omitted); *State v. Bigbear*, __ N.W.3d __, __ (Minn. July 31, 2024) (reiterating that “[h]armless-error review considers whether a reasonable possibility exists that the error significantly influenced the verdict, not merely whether the other properly admitted evidence was sufficient to support the verdict.”). “The burden rests on [the defendant] to establish a reasonable possibility that the jury would have reached a different verdict had the wrongfully admitted testimony not come in.” *State v. Jaros*, 932 N.W.2d 466, 472 (Minn. 2019). Appellate courts consider four factors to determine whether there is a reasonable possibility that erroneously admitted evidence impacted the jury’s verdict, including “(1) the manner in which the party presented the evidence, (2) whether the evidence was highly persuasive, (3) whether the party who offered the evidence used it in closing, and (4) whether the defense effectively countered the evidence.” *State v. Smith*, 940 N.W.2d 497, 505 (Minn. 2020).

Ball has not shown that there is a reasonable possibility that the jury would have reached a different verdict had B.E.’s recorded statement not been admitted. First, the recorded statement was introduced and admitted into evidence after B.E. acknowledged having made the prior statement, thus making the recording itself merely duplicative of B.E.’s testimony. Second, we do not agree with Ball that the statement was highly persuasive. Ball claims the statement was persuasive because allegedly possessing a gun is highly prejudicial. To prove Ball committed domestic assault, the state needed to show that Ball intentionally caused L.I. to fear immediate bodily harm and that L.I. qualified as a member of Ball’s family or household. Minn. Stat. § 609.2242, subd. 4. And whether Ball had a gun when B.E. saw him in the motel parking lot after the assault incident with

L.I. in the motel room, says nothing about whether Ball committed domestic assault against L.I. Third, although the statement was referenced during closing argument, the prosecutor acknowledged that Ball might not have had a gun and noted that L.I. testified that she did not see a gun. In fact, the prosecutor told the jury that Ball was not charged with any crimes in connection with either B.E. or L.T. and it, therefore, does not matter whether Ball possessed a gun in the parking lot because it “doesn’t change what happened in that [motel] room.” Finally, Ball had the opportunity to cross-examine B.E. about his recorded statement but did not. After weighing these factors, we conclude that Ball failed to establish that there is a reasonable possibility that the jury would have reached a different verdict if B.E.’s recorded statement was not admitted.

II. The district court abused its discretion by sentencing Ball pursuant to the career-offender statute.

Ball argues that the district court abused its discretion by sentencing him pursuant to the career-offender statute, contending that the state failed to prove that he had five qualifying convictions because two of the convictions that the state presented do not qualify as felonies in Minnesota.¹ We agree.

Appellate courts “review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). “If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed. But if the district court’s

¹ Ball also argues that the district court plainly erred by relying on criminal complaints to find a pattern of criminal conduct. Because we determine that Ball did not have the requisite number of prior felony convictions, we do not reach this argument.

reasons for departure are improper or inadequate, the departure will be reversed.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted).

When a person is convicted of a felony, Minnesota law permits a district court to impose an aggravated durational departure up to the statutory maximum sentence “if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct.” Minn. Stat. § 609.1095, subd. 4 (2020).

An out-of-state conviction can be counted as a qualifying prior felony conviction if it meets certain requirements. “An offense may be counted as a felony only if it would *both* be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence” Minn. Sent’g Guidelines 2.B.5.b. (2021) (emphasis added). “The offense definitions in effect when the current Minnesota offense was committed govern the designation of non-Minnesota convictions as felonies” *Id.* “The state has the burden of proving by a preponderance of the evidence the facts necessary to justify consideration of out-of-state convictions in determining a defendant’s criminal history score.” *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008).

The state presented evidence that Ball had six prior felony convictions. Ball claims two of the convictions—one from California and another from Nevada—do not qualify as felonies in Minnesota.

1985 California Conviction

Ball argues that the California conviction is not a qualifying offense because the state did not prove by a preponderance of the evidence that Ball actually received a felony-level sentence for the conviction. We agree.

Because of the age of the California conviction, the only record the state was able to obtain was the transcript of the plea hearing. At the plea hearing, Ball agreed that the charge “carrie[d] a state prison sentence of two, three, or four years.” Ball also agreed that “in all likelihood in this case [he] would be going to state prison for the high base of four years.” The state argues that the district court properly relied upon this evidence as sufficient proof of the sentence imposed. Because the state provided no evidence of the sentence that Ball *actually* received, we are not persuaded.

To qualify as one of the requisite prior convictions, the state must present evidence of the sentence actually imposed. *See* Minn. Sent’g Guidelines 2.B.5.b. (requiring that, to be a qualifying out-of-state conviction, “the offender received a sentence that in Minnesota would be a felony-level sentence”).

The state relies on *State v. Jackson* to argue that the proof of a sentence is not limited to a certified copy of the court order. 358 N.W.2d 681 (Minn. App. 1984). However, *Jackson* is inapposite. In that case, the state presented statements from the appellant’s probation officer that the appellant had “received three years[’] probation, a felony sentence.” *Id.* at 683. Even though it was not presented through a certified court order, we determined that the state had presented evidence of the sentence that the appellant had actually received. In contrast, at Ball’s sentencing hearing the state did not present any

evidence of the sentence that Ball actually received. As a result, the state failed to prove that the California conviction is a felony for purposes of the career-offender statute.

2001 Nevada Conviction

Ball argues that the 2001 Nevada conviction is not a qualifying conviction because his firearm offense would not be defined as a felony offense in Minnesota. We agree.

In the 2001 Nevada case, Ball pleaded guilty to “attempt[ed] possession of a firearm by an ex-felon.” That Nevada criminal statute provides, “A person shall not own or have in [their] possession or under [their] custody or control any firearm if the person . . . [h]as been convicted of a felony in this State.” Nev. Rev. Stat. § 202.360 (2000).

Hence, in contrast to Minnesota law, a person who is convicted of *any* felony offense in Nevada is prohibited from possessing a firearm. Therefore, we must consider whether the predicate felony offense that led to Ball’s prohibition from possessing a firearm in Nevada would similarly prevent him from possessing a firearm in Minnesota.

The underlying felony which prohibited Ball from possessing firearms in Nevada, was a conviction for “attempt[ed] coercion.” The Nevada coercion statute states,

It is unlawful for a person, with the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing, to:

- (a) Use violence or inflict injury upon the other person or any of the other person’s family, or upon the other person’s property, or threaten such violence or injury;
- (b) Deprive the person of any tool, implement or clothing, or hinder the person in the use thereof; or
- (c) Attempt to intimidate the person by threats or force.

Nev. Rev. Stat. § 207.190(1) (2000).

Minnesota law does not prohibit a felon convicted of coercion, a violation of Minn. Stat. § 609.27 (2020), from possessing a firearm. In Minnesota, only individuals who have been convicted of an enumerated crime of violence are prohibited from possessing firearms. Minn. Stat. § 624.713, subd. 1(2) (2020). The list of enumerated crimes of violence does not include coercion or any other offense with elements similar to those of the Nevada offense. *See* Minn. Stat. § 624.712, subd. 5 (2020). As a result, Ball's underlying conviction for attempted coercion would not have prohibited him from possessing a firearm pursuant to Minnesota law. Therefore, this conviction may not be used by the state to support the requisite five convictions.² *See* Minn. Sent'g Guidelines 2.B.5.b. (requiring that, to be a qualifying conviction, an out-of-state felony "be defined as a felony in Minnesota").

We therefore conclude that the district court abused its discretion by sentencing Ball pursuant to the career-offender statute. Because the record has been fully developed before the district court, we remand for Ball to be sentenced without regard to the career-offender statute. *Contra Outlaw*, 748 N.W.2d at 356 (remanding with permission to further develop

² In its brief, the state primarily relies on an argument that Ball's California conviction for assault with a deadly weapon can serve as the underlying conviction preventing Ball from possessing a firearm. The state, however, misapprehends its burden of proof. The only evidence it presented showed that the Nevada coercion conviction was the underlying conviction for his attempted possession of a firearm prosecution. And we have already stated that the coercion conviction is not an equivalent of a crime of violence and does not prohibit Ball from possessing a firearm in Minnesota.

the sentencing record so that the district court can determine whether out-of-state convictions were felonies when no postconviction review had occurred).

Affirmed in part, reversed in part, and remanded.