

*This opinion is nonprecedential except as provided by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
A23-1929**

State of Minnesota,
Respondent,

vs.

Jermaine La Johnson, Sr.,
Appellant.

**Filed September 30, 2024
Affirmed in part, reversed in part, and remanded; motion denied
Connolly, Judge**

Olmsted County District Court
File No. 55-CR-22-5172

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from final judgment of conviction, appellant challenges his sentence, arguing that the district court erred by (1) imposing an upward durational departure without stating reasons for the departure; (2) including two Illinois convictions in his criminal-

history score; and (3) entering convictions for multiple offenses where the offenses were committed during a single behavioral incident. Appellant also moved to strike an argument from respondent's brief as not properly before this court. We affirm in part, reverse in part and remand. We also deny appellant's motion to strike.

FACTS

Appellant Jermaine La Johnson, Sr.¹ and his ex-girlfriend lived together for about two years, during which a son was born to the couple. The relationship ended in July 2022, after the ex-girlfriend discovered that appellant had been unfaithful. Shortly before the breakup, appellant moved out of his ex-girlfriend's residence and, a couple weeks after the breakup, the ex-girlfriend began dating appellant's adult son. Appellant was unhappy that his former girlfriend was dating his son and expressed this dissatisfaction in text messages to his ex-girlfriend. As threatened in his text messages, appellant then entered his ex-girlfriend's home unannounced, assaulted her in her bedroom while she was "cradling" their one-year-old child, and left with her cell phone.

Respondent State of Minnesota charged appellant with the following offenses: count I, first-degree burglary—occupied dwelling; count II, first-degree burglary—assault of a person in the building; count III, third-degree assault—victim under the age of four; count IV, interference with a 911 call; count V, theft of property valued at \$500 or less; count VI, domestic assault—fear of immediate bodily harm; and count VII, domestic assault—

¹ Appellant claimed on the record that his full name is Jermaine LaJuane Johnson.

infliction of bodily harm. A jury later found appellant guilty of all counts except third-degree assault—victim under the age of four, and interference with a 911 call.

A pre-sentence investigation (PSI) was conducted prior to sentencing. The PSI assigned appellant ten criminal-history points, which included criminal-history points for several prior convictions from Illinois. A sentencing worksheet, completed in conjunction with the PSI, reflected that first-degree burglary—assault of a person in the building (count II), was a severity level eight offense, and that, with ten criminal-history points, and a three-month custody enhancement, the sentencing range was 95-132 months. Conversely, first-degree burglary—occupied dwelling (count I), is a severity level six offense, which carries a sentencing range of 52-71 months when calculated with ten criminal-history points and a three-month custody enhancement. *See Minn. Sent’g Guidelines 4.A, 5.A (2022).*

At the sentencing hearing, appellant argued for a downward departure from the sentencing guidelines, and respondent argued for a top-of-the-box sentence of 132 months. The district court denied appellant’s departure motion, “adjudicated [him] guilty of first-degree burglary,” and sentenced him to 100 months in prison. Thereafter, a warrant of commitment was filed stating that appellant was convicted of all counts except counts III and IV, of which he was acquitted. The warrant of commitment also sentenced appellant on count I, first-degree burglary—occupied dwelling, rather than the more serious burglary charge contained in count II.

This appeal follows.

DECISION

I.

Appellant challenges his sentence for first-degree burglary, claiming that the sentence constitutes an unlawful upward departure. We review de novo whether a sentence is authorized by law. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

A district court may grant a departure from the sentencing guidelines when “there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2022). “If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). But “[i]f no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.” *State v. Williams*, 361 N.W.2d 840, 844 (Minn. 1985). The remedy for an unsupported durational departure is to remand for resentencing within the presumptive range. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). When the district court does not state its reasons for departure on the record at the time of sentencing, it is error for a reviewing court to remand to the district court to allow it to provide reasons for the departure after sentencing has occurred. *Id.*

Appellant claims that the district court sentenced him on count I, which carries a presumptive sentence of 60 months in prison due to his criminal-history score. He argues that, because the district court sentenced him to 100 months in prison, his sentence constitutes an upward departure. Appellant argues further that, because the imposition of an upward departure may only be imposed when substantial and compelling reasons are

present, and the district court failed to identify such reasons, his sentence must be reversed, and the case should be remanded for imposition of the presumptive sentence.

Respondent contends that the “district court erroneously signed a warrant of commitment that indicated a sentence for Count I, burglary in the first degree (occupied dwelling), a severity level 6 offense, instead of Count II.” As such, respondent agrees that the case should be remanded “with instructions to correct the errors in the sentencing worksheet.” But respondent argues that the record is “abundantly clear” that the “district court intended to convict and sentence [appellant] for Count II” because the court indicated on the record at the sentencing hearing that appellant was being sentenced on count II, the most serious offense.² We agree.

Generally, appellate courts “look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). But when a district court’s orally pronounced sentence differs from the warrant of commitment, the oral pronouncement controls. *State v. Statloch*, 643 N.W.2d 329, 331 (Minn. App. 2002).

² Appellant moved to strike respondent’s argument on this issue, claiming that it is not properly before us because, “[i]f [respondent] thought the district court erred by sentencing [appellant] on Count I and not sentencing him on Count II, then [respondent] should have appealed the sentence,” which it “chose” not to do. But respondent is not challenging appellant’s sentence on appeal, nor does it claim that appellant’s sentence was unlawful; rather respondent merely agrees that, with respect to this issue, the matter should be remanded to correct the clerical error in the sentencing worksheet. We, therefore, deny appellant’s motion to strike because respondent’s argument on this issue is properly before us.

Additionally, the court may correct clerical errors in the warrant of commitment at any time. Minn. R. Crim. P. 27.03, subd. 10.

Here, we acknowledge that a sentence of 100 months in prison for first-degree burglary—occupied dwelling would be an upward departure because, with appellant’s criminal-history score, and a three-month custody enhancement, the sentencing range for that offense is 52-71 months in prison. *See* Minn. Sent’g. Guidelines 4.A, 5.A. But at the beginning of the sentencing hearing, the district court stated: “The most serious offense . . . before the Court for sentencing is first-degree burglary. It’s a severity level 8 offense, [appellant has] 10 criminal history points, the presumptive disposition is a commit to the commissioner within the range of 95 to 132 months, the middle of the box is 111.” The district court then acknowledged two more times during the sentencing hearing that the applicable sentencing range for appellant’s offense was 95-132 months. And after hearing general sentencing arguments, the district court “adjudicated [appellant] guilty of first-degree burglary,” and “committed [him] to the Commissioner of Corrections of the State of Minnesota for a period of 100 months.” Although the district court never stated on the record that it was sentencing appellant on count II, the court “adjudicated [appellant] guilty of first-degree burglary,” and repeatedly stated that the offense at issue has a sentencing range of 95-132 months. First-degree burglary—assault of a person in a building, is the most serious offense of which appellant was found guilty, and when calculated with appellant’s criminal-history score, that offense has a sentencing range of 95-132 months. *See* Minn. Sent’g Guidelines 4.A. As such, the record unambiguously shows that appellant was convicted of, and sentenced for, count II, first-degree burglary—assault of a person in

a building. And because appellant was sentenced on count II, which carries a sentencing range of 95-132 months, the district court's sentence of 100 months in prison does not constitute an upward departure.

Moreover, our supreme court has acknowledged that Minn. Stat. § 609.035 (2022) “contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.” *State v. Franks*, 765 N.W.2d 68, 77 (Minn. 2009) (quotations omitted). Thus, the district court was required to sentence appellant on count II because it was the most serious offense arising out of a single behavioral incident. *See id.* And to adopt appellant's argument would be inconsistent with supreme court precedent. Thus, we affirm the district court's imposition of sentence on count II, but we remand the case to correct the clerical error in the warrant of commitment that erroneously states that appellant was convicted and sentenced on count I.

II.

Next, appellant challenges the calculation of his criminal-history score. Generally, we review a district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Stiliday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002). But the interpretation of the sentencing guidelines presents a legal issue, which we review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

The sentencing guidelines “provide uniform standards for the inclusion and weighting of criminal history information that are intended to increase the fairness and equity in the consideration of criminal history.” *State v. Reece*, 625 N.W.2d 822, 824

(Minn. 2001) (quotation omitted). Convictions from other jurisdictions must be considered in calculating an offender’s criminal-history score under the guidelines. *Id.*; *see also* Minn. Sent’g Guidelines 2.B.5.a (2022). An out-of-state conviction may be counted as a felony only if it would be defined as a felony in Minnesota “based on the elements of the prior non-Minnesota offense” and “the offender received a sentence that in Minnesota would be a felony-level sentence.” Minn. Sent’g Guidelines 2.B.5.b (2022). The state bears the burden to “show that a prior conviction qualifies for inclusion within the criminal-history score.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). “[T]he district court may not use out-of-state convictions to calculate a defendant’s criminal-history score unless the state lays foundation for the court to do so.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

The district court here sentenced appellant using a criminal-history score that included points for several Illinois convictions. Appellant argues that this was error because respondent failed to “prove that at least two of those convictions were properly included” in his criminal-history score. Respondent acknowledges that it failed “to submit any evidence to prove [appellant’s] . . . criminal history score.” But respondent argues that, because appellant “did not object to his criminal history score below, the proper procedure is to remand with instructions to further develop the sentencing record.”

We agree. Although the state need not present certified copies of out-of-state convictions for the convictions to be included in a defendant’s criminal-history score, the state must provide “persuasive evidence that sufficiently substitutes for the official, certified records of conviction.” *Maley*, 714 N.W.2d at 711-12. If the state fails to meet

its burden, the proper remedy is to reverse and remand for resentencing. *See id.* at 715. But if the defendant fails to object to his criminal-history score at sentencing, the state may “further develop the sentencing record” on remand to allow the district court to determine whether the relevant out-of-state convictions were properly included in the defendant’s criminal-history score. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008).

Here, although respondent failed to present any evidence related to appellant’s out-of-state convictions, appellant did not object to his criminal-history score below. Accordingly, we reverse appellant’s sentence and remand to allow respondent to introduce evidence to satisfy its burden of proof with respect to the proper calculation of appellant’s criminal-history score. *See id.*

III.

Finally, appellant contends that the district court erred by entering convictions for multiple offenses that arose out of the same behavioral incident. “Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2022). This statute bars not only multiple convictions for an offense and its included offenses, but also “multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). The rule set forth in *Jackson* applies when (1) multiple offenses arise “under different sections of the same statute,” and (2) the offenses are committed “as part of a single behavioral incident.” *State v. Bonkowske*, 957 N.W.2d 437, 444 (Minn. App. 2021). We generally review de novo

whether a conviction violates section 609.04. *Id.* at 443. But whether offenses occurred as part of a single behavioral incident is a mixed question of fact and law; we review the district court’s factual findings for clear error and its application of the law to those facts de novo. *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020).

Here, the warrant of commitment reflects that convictions were entered on count I, first-degree burglary—occupied dwelling; count II, first-degree burglary—assault of a person in the building; count V, theft of property valued at \$500 or less; count VI, domestic assault—fear of immediate bodily harm; and count VII, domestic assault—infliction of bodily harm. Appellant argues that this was error because both counts VI and counts VII “were committed during a single behavioral incident.” Respondent acknowledges that appellant “should not be convicted of Count VI, domestic assault—fear.” In fact, respondent argues that a “remand is required to clean up the sentencing order,” and that, on remand, the district court should be instructed “to vacate any convictions for Counts I, V, and VI, and to enter judgment of conviction for Counts II and VII.”

The supreme court recently stated that “[a] burglary conviction ‘is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered.’” *State v. Smith*, 940 N.W.2d 497, 507 (Minn. 2020) (quoting Minn. Stat. § 609.585 (2018)). “But if a defendant commits multiple crimes during the burglary against the same victim, the district court can only sentence the defendant for one additional crime.” *Id.*

Here, appellant was charged with, and found guilty of, multiple offenses arising out of his entry into his ex-girlfriend’s residence. As addressed above, because count II was

the most serious offense, appellant should be convicted of that offense. *See Franks*, 765 N.W.2d at 78 (stating that Minn. Stat. § 609.035 “contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses” (quotation omitted)). And under *Smith*, appellant could be convicted of one other offense arising out of the burglary conviction. 940 N.W.2d at 507. That offense would be count VII, domestic assault—bodily harm, since that is the underlying assault related to count II. But because the remaining offenses arose from the same behavioral incident, it was impermissible for the district court to convict appellant of those offenses. *See id.* Accordingly, we reverse and remand to the district court to vacate appellant’s adjudications for counts I, V, and VI, but leave the jury’s finding of guilt intact.

Affirmed in part, reversed in part, and remanded; motion denied.