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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1394**

State of Minnesota,
Respondent,

vs.

Ontario Dariell Whiteside,
Appellant.

**Filed June 10, 2013
Reversed and remanded
Halbrooks, Judge**

Scott County District Court
File No. 70-CR-11-28325

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Ontario Dariell Whiteside challenges his sentence for his convictions of first-degree burglary, two counts of felony domestic assault, and felony violation of a

domestic abuse no contact order (DANCO), arguing that the district court abused its discretion by including in his criminal-history score a felony point for a prior Iowa offense that would not necessarily constitute a felony in Minnesota. Because this issue was not considered at sentencing, we reverse and remand the matter to the district court.

FACTS

Whiteside was charged with one count of first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2010); two counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subds. 1(1), 1(2), 4 (2010); and one DANCO violation under Minn. Stat. § 629.75, subd. 2(d)(1) (2010), for assaulting his estranged wife. Whiteside pleaded not guilty to each charge.

Prior to trial, Whiteside moved to withdraw his guilty plea from a 2011 conviction of felony domestic assault. The state was relying on that conviction to enhance the two domestic-assault charges to felony-level offenses in this case. Whiteside argued that his 2011 domestic assault had been impermissibly enhanced by his 2001 Iowa conviction of assault while participating in a felony—an offense that, he asserted, was not necessarily a felony under Minnesota law. The district court denied Whiteside’s motion to withdraw his plea, finding that the Iowa conviction is sufficiently similar to other predicate offenses for felony domestic assault to be used for enhancement.

A jury found Whiteside guilty on all counts. Probation calculated Whiteside’s criminal-history score as four, assigning one custody-status point for commission of the offense while serving probation and three felony points, including one for Whiteside’s 2001 Iowa conviction of assault while participating in a felony. Based on that criminal-

history score, the district court sentenced Whiteside to 105 months' imprisonment for first-degree burglary and a consecutive period of 366 days for felony domestic assault. This appeal follows.

D E C I S I O N

Although Whiteside did not raise the issue of his criminal-history score at sentencing, appellate review of that issue is not precluded. *See State v. Maurstad*, 733 N.W.2d 141, 147-48 (Minn. 2007) (interpreting Minn. R. Crim. P. 27.03, subd. 9, as preventing a defendant from waiving or forfeiting appellate review of a criminal-history-score calculation). We review a district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

When calculating an offender's criminal-history score, "[t]he designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law." Minn. Sent. Guidelines II.B.5 (2011). The state bears the burden of establishing the facts necessary to justify inclusion of an out-of-state conviction in an offender's criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). Accordingly, 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 constitutes a felony in Minnesota. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983).

Here, the district court sentenced Whiteside based on a criminal-history score that included a felony point for an Iowa conviction. But there is no evidence in the record,

and no argument made at sentencing, concerning the factual basis of that offense and whether it would constitute a felony in Minnesota. We therefore reverse and remand this matter to the district court for an evidentiary hearing on the issue of whether Whiteside's Iowa conviction of assault while participating in a felony should be included in his criminal-history score.

Reversed and remanded.