STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0935

State of Minnesota,
Respondent,

vs.

Kevin Lamont Mims,
Appellant.

Filed July 1, 2013
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-CR-11-28744

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

SMITH, Judge

Following a jury trial, appellant challenges his convictions of second-degree unintentional murder and second-degree assault. He asserts that Minnesota law requires

reversal of his convictions because the district court failed to give the jury an unrequested instruction on defense of dwelling. He contends that this instruction was required because he had slept in his vehicle near the time of the offenses and the offenses occurred in his vehicle. Therefore, appellant argues, the district court erroneously instructed the jury that he had a duty to retreat. Appellant also asserts error in the district court's calculation of appellant's criminal-history score, namely, that the district court included appellant's out-of-state conviction, which does not have an exact equivalent under Minnesota law. Because our examination of the record reveals no error mandating reversal, we affirm.

FACTS

Appellant Kevin Mims spent the night of September 11, 2011, with his friends R.B., J.H., and B.N. Mims drove the group to Minneapolis for the four of them to patronize a downtown nightclub. En route, the four men smoked marijuana. When they arrived downtown, Mims parked his vehicle on the second level of the Ramp C parking ramp.

The men spent the evening drinking alcohol in the nightclub, where they stayed until approximately 2:00 a.m. After the nightclub closed, they continued to converse with women outside the nightclub until approximately 3:00 a.m.

The men then returned to Mims's parked car in Ramp C. Mims was in the driver's seat, R.B. was in the passenger's seat, and J.H. and B.N. shared the backseat. Before leaving the parking ramp, the men decided to sit in the vehicle and smoke marijuana. Tensions rose when Mims refused to contribute his marijuana to the communal blunt

(marijuana cigar). J.H. testified that after R.B. requested that Mims contribute marijuana for the men to smoke, Mims jumped on top of R.B., placed both hands on R.B.'s neck, and choked him to the point that R.B. began fainting. R.B. attempted to defend himself, but an arm cast from a previous injury limited his ability to do so. B.N., still in the backseat, then exited the car, ran to the passenger door, and attempted to stop the fight by pulling Mims off R.B. Because Mims was fearful that the others would steal his money and car, he grabbed his culinary scissors. The scissors, which are designed to separate into two pieces for cleaning, came apart. Mims proceeded to stab R.B. and B.N. with the scissor half he held.

Mims recalls the genesis of the altercation differently. He contends that R.B. started the fight by grabbing Mims's car keys and physically battering Mims. This prompted Mims to respond by "jump[ing] over there to [R.B.] and grab[bing] him by his head" so R.B. would stop punching him. Mims reported grabbing the scissor after B.N. intervened because he "wanted to get [R.B. and B.N.] off [him]."

As the scuffle continued, B.N. left the area of the car and limped away to the parking ramp's elevator bank in the skyway. Eventually Mims, R.B., and J.H. went to see B.N. They found him lying supine in a pool of blood. J.H. called 911 and reported that Mims had stabbed B.N. A security guard arrived and found B.N. lying on the ground and Mims, R.B., and J.H. arguing with each other. B.N. was unresponsive when police responded to the scene. Mims's car keys were in B.N.'s pocket, though it is unclear how they got there. B.N. sustained two stab wounds, one near his armpit and another in his

left chest region. According to medical experts, B.N.'s chest wound likely caused his death. R.B. sustained one stabbing injury, which required eight stitches.

Mims was subsequently charged with second-degree unintentional murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2010) and second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2010). In his pretrial notice of defenses, Mims listed "Not Guilty" and "Self Defense."

A jury trial was held in early 2012. Mims testified that near the date of the stabbing, he was living in St. Paul. However, he also testified that shortly before the date of the stabbing, he and his children's mother had a disagreement, resulting in him sleeping in his car. He said that, because of the disagreement, "everything I owned was in my car. Every piece of everything I owned was in my car." He also explained that the scissor he used was part of a culinary knife kit that he used for his employment.

During closing argument, Mims maintained that he was defending himself against R.B.'s attack and attempting to retrieve his car keys from R.B. Mims also highlighted that the others were mad at him, claiming he was stingy with his marijuana. Mims discussed the duty to retreat in self-defense, but argued that he had been unable to retreat because R.B. and B.N. were attacking him. The closing argument did not include any mention of defense of dwelling.

The district court instructed the jury on self-defense, including that "[t]he legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat or avoid the danger if reasonably possible." The jury found Mims guilty of both charged offenses. For the second-degree murder, the district court

sentenced Mims to 225 months' imprisonment, which is the presumptive term for a criminal-history score of five. For the second-degree assault, the district court sentenced Mims to a consecutive sentence of 21 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Mims first argues that the district court erred by instructing the jury that Mims had a duty to retreat because Mims was sleeping in his car, and therefore, he was defending his dwelling.

Mims acknowledges that he did not object to the "incorrect self-defense instruction" by the district court. As such, he urges us to use the plain-error standard of review when analyzing the purportedly incorrect jury instruction. It is established Minnesota law that "before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three *Griller* prongs are satisfied, we then analyze whether the error should be addressed to ensure the fairness and the integrity of the judicial proceedings. *Id.*

But although Mims calls for plain-error review, he does not address whether his claim is actually preserved for appeal—an omission the state highlights. We have previously held that "[a] defendant's failure to propose specific jury instructions or to object to instructions before they are given generally constitutes a waiver of the right to challenge the instructions on appeal." *State v. Hersi*, 763 N.W.2d 339, 342 (Minn. App. 2009). Even so, we still have discretion to review whether there was plain error affecting

substantial rights. *See State v. Wembley*, 712 N.W.2d 783, 790-92 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243, 245 (Minn. 2007). Therefore, we will continue our analysis, reviewing for plain error.

Most relevant to the determination of whether the district court erred in this situation is the Minnesota Supreme Court case, *State v. Gustafson*. 610 N.W.2d 314 (Minn. 2000). In *Gustafson*, the defendant challenged his assault convictions, arguing that the district court erred by failing to give the jury an unrequested self-defense instruction. *Id.* at 316. The supreme court acknowledged that the evidence might have supported a self-defense argument, but it held that the district court did not err by failing to instruct the jury on self-defense because the defendant did not request the instruction, did not argue self-defense at trial, did not otherwise suggest a reliance on self-defense in questions to witnesses, and did not disclose to the state the intent to rely on self-defense as required by the rules of criminal procedure. *Id.* at 320. The supreme court noted that, "while the [district] court has the ultimate responsibility to ensure that all essential instructions are given under the law, that responsibility does not require the [district] court to instruct the jury, sua sponte, on the affirmative defense of self-defense when it was not raised, argued, or requested." *Id.* at 320 (quotation and citation omitted).

Although the *Gustafson* defendant sought to argue self-defense, whereas here Mims seeks to add defense of dwelling, *Gustafson* largely mirrors the present matter. The state requested that Mims disclose his defenses pursuant to Minnesota Rule of Criminal Procedure 9.02. Mims complied, informing the state that "Not Guilty" and "Self Defense" were the defenses he may rely on at trial. He did not include defense of

dwelling as a defense available to him. This omission is akin to *Gustafson*, where the defendant did not claim his affirmative defense on his rule 9.02 disclosure, a fact the supreme court cited as "[c]ritical to [its] analysis." *Id.*, 610 N.W.2d at 320. Regarding jury instructions, Mims requested an instruction regarding self-defense, but his proposed instructions include no mention of the defense of dwelling; nor do they make any claim that his vehicle was his dwelling. Moreover, Mims's proposed instructions include the duty to retreat language that Mims now argues the district court erred by including. This fact also parallels *Gustafson*, in which the defendant failed to propose the desired instruction. *Id.* Finally, Mims failed to address defense of dwelling in his closing argument, and he concedes that he did not object to the jury instructions. Indeed, Mims's counsel said of the instructions, "I preferred my form, but I believe the instructions the [district c]ourt has come up with are in substance correct and convey all the information that I wanted to convey. So, although I prefer the form of mine, I believe the substance is there."

Because we conclude that there was no error, we need not continue the plain-error analysis. *State v. Manley*, 664 N.W.2d 275, 283 (Minn. 2003) (noting that a court need not address all three prongs if the appellant is unable to establish one of the prongs).

Finally, Mims briefly argues that, because a person in lawful possession of personal property may use reasonable force to resist trespass, a person has no duty to retreat when protecting personal property—in Mims's case, his car. *See* Minn. Stat. § 609.06, subd. 1(4) (2010) (stating that a person in lawful possession of real or personal property may use "reasonable force" toward another person "in resisting a trespass upon

or other unlawful interference with such property"). Again, Mims included duty to retreat language in his proposed jury instructions, and did not object to such language, instead saying that the jury instructions' "substance is there." Mims cites no authority that supports his contention that there is no duty to retreat for protection of personal property. The supreme court examined the duty to retreat in self-defense cases and concluded that "self-defense in the home should not incorporate a duty to retreat." *State v. Carothers*, 594 N.W.2d 897, 903 (Minn. 1999). A review of relevant law reveals no similar holding for defense of property.

Mims did not disclose defense of dwelling to the state, included duty to retreat language in his proposed instructions, did not argue defense of dwelling at trial, and did not object to the district court's inclusion of the duty to retreat language. There was no error in the district court's failure to sua sponte instruct the jury on an affirmative defense not "raised, argued, or requested." *See Gustafson*, 610 N.W.2d at 320. Because there was no error, we affirm as to this issue.

II.

Mims next argues that the district court erred by weighing his Illinois aggravated unlawful-use-of-a-weapon (AUUW) conviction as a felony, and that instead he should have received no "points" for that conviction.

The parties disagree about what standard of review we use when analyzing challenges to the district court's computation of a defendant's criminal-history score. Mims acknowledges that he did not dispute the district court's handling of his Illinois AUUW conviction at the sentencing hearing. Although the state urges us to review

Mims's sentencing challenge for plain error because it is an unobjected-to assertion of error, we decline to apply the plain-error analysis here. *See* Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered . . . on appeal even if it was not brought to the trial court's attention."); *State v. Maurstad*, 733 N.W.2d 141, 147-48 (Minn. 2007) (holding that the plain-error doctrine is inapplicable when challenging a criminal-history score because a defendant cannot waive review of his or her criminal-history score calculation and an incorrect criminal-history score constitutes an "illegal sentence"). Instead, we review the district court's determination of a 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).

The focus of Mims's challenge to his criminal-history score is a past out-of-state conviction he received. In August 2001, Mims was convicted in Illinois of felony AUUW in violation of Illinois state law. *See* 720 Ill. Comp. Stat. 5/24-1.6(a)(1), (a)(3) (2000). According to the presentence investigation, Mims had already been convicted of two felonies for possession of controlled substances before he received his AUUW conviction. His counsel conceded this point during oral argument on appeal. Even so, Mims argues that the district court erred by calculating Mims's 2001 AUUW conviction as similar to a Minnesota felon-in-possession-of-a-firearm conviction. *See* Minn. Stat. § 609.165, subd. 1a (2010).

A district court considers out-of-state convictions when calculating a defendant's criminal-history score. Minn. Sent. Guidelines cmt. 2.B.502 (2011). Applying current Minnesota law to out-of-state convictions ensures that each defendant prosecuted in

Minnesota has his or her criminal-history score computed according to the same basic standards. *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). Minnesota law values such a policy because "it would simply be unfair to those defendants receiving criminal history points for prior Minnesota convictions if their counterparts with prior foreign or out-of-state convictions of similar offenses for the same basic conduct did not receive criminal history points for those offenses." *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992). The district court is not required to engage in a mini-trial for each out-of-state conviction to determine what the conduct was underlying the out-of-state conviction. *Id.*

The district court exercises its discretion when determining the equivalent Minnesota felony for an out-of-state felony, based on the definition of the out-of-state offense and the sentence received by the offender. *See* Minn. Sent. Guidelines 2.B.5 (2011). The supreme court has directed district courts to use their discretion when determining the weight accorded to non-Minnesota convictions by considering the factors the sentencing guidelines provide and "[i]n doing so, the [district] court must comply with the sentencing guidelines' mandate that the [district] court determine how the offender would have been sentenced had the offense occurred in Minnesota at the time of the current offense, not when the offense actually occurred out of state." *Reece*, 625 N.W.2d at 825. The *Reece* court highlighted the Minnesota Sentencing Guidelines instruction that "[t]he severity level to be used in assigning weights to prior offenses shall be based on the severity level ranking of the prior offense of conviction that is in effect *at the time the offender commits the current offense*." *See* Minn. Sent. Guidelines 2.B.1. (emphasis added); *Reece*, 625 N.W.2d at 825.

The language of the AUUW statute establishes that it is a felony offense. *See* 720 Ill. Comp. Stat. Ann. 5/24-1.6(d) (West 2010) ("Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years.").[1] Minnesota law provides for a variety of gun-related offenses, with the various offenses carrying different penalties. Included in this array is the felon-in-possession-of-a-firearm statute, which provides that it is a felony for a person convicted of a past felony "crime of violence" to possess a firearm. Minn. Stat. § 609.165, subds. 1a, 1b (2010). The definition of "crime of violence" includes drugs and controlled substances. Minn. Stat. § 624.712, subd. 5 (2010). Minnesota law also prohibits firearm possession by a person who "has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year," and the penalty for such an offense is classified as a gross misdemeanor. Minn. Stat. § 624.713, subds. 1(10)(i), 2(c) (2010). Finally, a person who carries a firearm without a permit is also guilty of committing a gross misdemeanor. Minn. Stat. § 624.714, subd. 1a (2010).

[1] Mims also highlights a 7th Circuit opinion released after his sentencing. *See Moore v. Madigan*, 702 F.3d 933, 940, 942 (7th Cir. 2012) (holding that Illinois's AUUW statute is unconstitutional, but asserting that felon-firearm prohibitions are valid). He employs *Moore* to bolster his argument that Minnesota does not have an equivalent to Illinois's AUUW statute, evidenced by *Moore*'s discussion of the unusually restrictive nature of Illinois's firearm possession laws. *See id.* at 940 ("Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home"). We acknowledge differences in Illinois's and Minnesota's criminal codes. But we are examining whether this particular offense may be considered equivalent to a Minnesota felony, and choose not to examine what other offenses Illinois could have charged Mims with at the time it chose to pursue an AUUW conviction.

At a preliminary hearing, the district court stated regarding the Illinois AUUW conviction that when it reviewed the conduct and applied Minnesota law, the AUUW conviction would be deemed a felony because the applicable Minnesota law would be the felon-in-possession-of-a-firearm statute. *See* Minn. Stat. § 609.165, subd. 1a (2010). The district court did not abuse its discretion by classifying the Illinois AUUW as such. It is apparent that Mims had been convicted of at least one prior felony at the time he received his AUUW conviction. He was then arrested and convicted of being in possession of a firearm.

Mims contends that by weighing the AUUW conviction as equivalent to the Minnesota felon-in-possession-of-a-firearm statute, a felony, the district court abused its discretion because it considered the "nature" of the offense. This is error, Mims argues, because the comments to the Minnesota Sentencing Guidelines no longer provide that the district court may consider the "nature of the offense." *Compare* Minn. Sent. Guidelines 2.B.5 (2011) (stating that "[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"), *with* Minn. Sent. Guidelines cmt. II.B.504 (2005) (stating that "[s]entencing courts should consider the nature and definition of the foreign offense, as well as the sentence received by the offender").

But this argument fails for two reasons. First, we are not convinced that the district court based its decision on the general "nature" of the offense, disregarding the definition and sentence. But, even if the district court had done so, the district court's consideration of the "nature" of the offense would not necessarily constitute error.

Although the Minnesota Sentencing Guidelines eliminated the word "nature" from the comments, Minnesota caselaw provides that, "in deciding whether out-of-state convictions can be treated as felonies for determining a guidelines criminal history score, the [district] court may look to the definition of the offense, the nature of the offense, and the sentence received." *State v. Combs*, 504 N.W.2d 248, 250 (Minn. App. 1993), *review denied* (Minn. Sept. 21, 1993).

Therefore, from this record, we conclude that the district court did not abuse its discretion by weighing Mims's AUUW conviction as a felony conviction to compute Mims's criminal-history score. Therefore, we affirm as to this issue.

Because the record reveals no trial error when the district court failed to sua sponte offer jury instructions on an additional affirmative defense, and the record reveals no sentencing error in the district court's computing of Mims's criminal-history score, we affirm.

Affirmed.