STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0206

State of Minnesota,
Respondent,

vs.

Demarcus Lemaine Barker,
Appellant.

Filed January 22, 2019
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Rice County District Court
File No. 66-CR-16-575

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

John Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Kalitowski, Judge.[*]

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

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

REILLY, Judge

Appellant argues that: (1) the evidence was insufficient to prove possession of controlled substances, (2) the evidence was insufficient to prove intent to sell marijuana, and (3) the district court erred by including four Illinois convictions in its criminal-history score calculation. We affirm the district court's determinations that the county proved beyond a reasonable doubt that appellant possessed the controlled substances and that appellant intended to sell the marijuana. Because the district court erred in its criminal-history score calculation, we reverse the district court's departure under Minn. Stat. § 609.1095, subd. 4 (2014). We, however, determine that the district court's sentence remains appropriate under Minn. Stat. § 609.1095, subd. 2 (2014). Because this distinction renders Minn. Stat. § 609.1095, subd. 3 (2014) (whether or not appellant is entitled to good time) inapplicable, we remand for further proceedings in accordance with this opinion.

FACTS

In March 2016, an agent with the Cannon River Drug and Violent Offender Task Force (the task force) received information from A.S.[1] A.S. told a task force agent that Appellant Demarcus Lemaine Barker (Barker) "sells large amounts of marijuana and cocaine and powder" and that Barker planned to go to Chicago to buy marijuana and cocaine and bring it back to Minnesota. A.S. needed to go to Chicago to obtain her birth

[1] A.S. has known Barker since 2014. In 2016, Barker injured A.S.'s husband during a fistfight. A.S.'s son witnessed the fight and called the police. Because Barker threatened her son about testifying in the pending criminal-assault case against Barker, A.S. requested a no-contact order. Barker was later convicted of felony-level assault.

certificate and she joined Barker on his trip. On March 11, 2016, A.S. signed a task-force cooperation agreement and allowed a tracking device to be placed on the car that she planned to drive to Chicago. A.S. informed the task force that Barker rented a Dodge Charger for the trip and provided the Charger's license plate number. That same day, A.S. and Barker drove to Chicago in separate vehicles that followed each other.

A.S. remained in contact with the task force during the four-day trip. A.S. told a task force agent that she accompanied Barker when he obtained ecstasy[2] pills from a man at a Chicago gas station, that the pills looked like they were purple and yellow, and that the pills were packaged in bundles. At that time, A.S. heard Barker place an order for cocaine from the man and saw baggies of a "brown rock substance" in the front console of the Charger.

On March 14, 2016, Barker and A.S. left Chicago to return to Minnesota. Barker's cousin, Andre Barker (Andre), accompanied Barker in the Charger, and A.S. followed them in her car. A.S. kept the task force informed of the group's whereabouts during their journey back to Minnesota. A.S. saw Barker and Andre "smoking weed in the car." That evening, Barker and Andre crossed the Minnesota border and traveled into Rice County. Because there was an active felony warrant for Barker's arrest on an unrelated matter, the task force planned to arrest him when he entered Rice County. When a Rice County Deputy Sheriff attempted to conduct a traffic stop of Barker's vehicle by activating its emergency lights, the Charger accelerated and fled at a high rate of speed. An officer

[2] The pills were later tested by the Bureau of Criminal Apprehension (BCA) and were found to be methamphetamine.

identified Barker as the driver of the Charger. During the course of the chase, officers saw the Charger's brake lights illuminate and a person quickly leave and then reenter the vehicle. The Charger continued to flee the police. Ultimately, the Charger crashed into a ditch at the intersection of Douglas Avenue and 195th Street and Barker and Andre fled on foot. Eventually, officers found Barker and Andre lying in a field on their stomachs and arrested them.

While the officers pursued Barker and Andre, an agent remained at the crash site with the Charger. The agent noticed that the Charger's passenger-side window was open, smelled an odor of marijuana, and noticed what looked like marijuana buds on the floor and dashboard. Officers collected 258.49 grams of marijuana from the Charger.

The next morning, several law enforcement officers searched the crash site and the route the Charger took for drugs or other contraband. Officers found controlled substances on a stretch of Douglas Avenue that the Charger had traveled. Three baggies containing purple and green pills were found within twenty-feet of each other. Officers also found two baggies containing a rock-like substance and a larger baggie that contained powder. All of these items were found on the east side of Douglas Avenue in a ditch south of the crash-site. BCA forensic scientists determined that the powder substance tested positive for cocaine and weighed over 27 grams; the rock-like substance tested positive for cocaine and weighed in excess of 5.8 grams; and the green and purple pills tested positive for methamphetamine, and each baggie weighed 2.6 grams. The state charged Barker with nine counts alleging various controlled substances crimes and fleeing the police officer in a motor vehicle.

Barker waived his right to a jury trial on both the issue of guilt and the existence of facts to support an aggravated sentence. During the court trial, A.S. identified the "brown rock-like" drugs collected from Douglas Avenue as the drugs she had observed in the Charger's center console while in Chicago. A.S. identified the purple and green pills that the officers found along Douglas Avenue as the same ones that she saw Barker purchase in Chicago. A.S. also testified that she saw Barker and his cousin "[grab] a large amount of marijuana" from a white Nike bag stored in the trunk of the Charger. Though A.S. heard Barker discuss purchasing "powder" with the same man from whom he purchased the pills, she did not see Barker purchase the cocaine. The district court found A.S. to be a credible, "frank and truthful" witness, with a "clear memory of what occurred in Chicago" and "no personal stake in the outcome" of the case. At the conclusion of trial, the district court found Barker guilty of all nine counts.

At sentencing in November 2017, the district court determined that Barker had seven criminal-history points from three prior Minnesota convictions and four Illinois convictions. The district court sentenced Barker to the Commissioner of Corrections for a period of 316 months on Count I, importing controlled substances across state borders in violation of Minn. Stat. § 152.0261, subd. 1 (2014), and for a period of 22 months on Count VII, fleeing a peace officer in a motor vehicle in violation of Minn. Stat. § 609.487, subd. 3 (2014), to run concurrently. The district court imposed a sentence that is an upward durational departure under Minn. Stat. § 609.1095, subds. 2 and 4. The district court also determined that Barker is not entitled to "good time" under Minn. Stat. § 609.1095, subd. 3.

This appeal follows.

D E C I S I O N

I. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence, this court undertakes "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). Appellate courts evaluate the sufficiency of the evidence for both jury trials and bench trials under the same standard of review. *See State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). We must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We will "not disturb the verdict if the [fact-finder], acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

If the state's evidence on one or more elements of a charged offense consists solely of circumstantial evidence, this court applies a heightened standard of review. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013); *see also Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). When reviewing a conviction based on circumstantial evidence, appellate courts apply a two-step test to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we must "identify the circumstances proved." *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). In identifying

the circumstances proved, this court assumes that the fact-finder resolved any factual disputes in a manner that is consistent with its verdict. *Id*. Second, we independently examine the "reasonableness of the inferences that might be drawn from the circumstances proved," and then "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id*. (quotations omitted). We must consider the evidence as a whole and not examine each piece in isolation. *Andersen*, 784 N.W.2d at 332.

A. Actual Possession of the Controlled Substances

The district court found that the circumstances "provide the necessary evidence to find that Barker possessed all of the drugs in Rice County and knew or believed the drugs were controlled substances." Baker, however, argues that the evidence was insufficient to prove that he possessed the drugs found on the side of the road because the state did not prove either actual or constructive possession beyond a reasonable doubt. The state asserts that this case is only about actual possession, which this court defines as "direct physical control." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). "The mere fact that an item is not in a defendant's physical possession at the time of apprehension does not preclude prosecution for actual possession of contraband." *Id*. at 354; *see also State v. Olhausen*, 681 N.W.2d 21, 23, 26 (Minn. 2004) (affirming first-degree controlled substance offenses, including possession, where there was a wealth of circumstantial evidence that the defendant had possessed methamphetamine but did not possess the substance when arrested).

When taken in the light most favorable to the verdict, the evidence proves the following circumstances: (1) Barker traveled to Chicago to purchase controlled substances; (2) during the trip, Barker purchased what he believed to be ecstasy pills that appeared purple and yellow and were packaged in bundles; (3) Barker obtained cocaine during the trip; (4) A.S. observed Barker possess crack cocaine; (5) crack cocaine and methamphetamine pills were stored in the center console of the Charger; (6) Barker possessed marijuana in the Charger's trunk; (7) when police attempted to stop Barker on his return to Minnesota, he fled; (8) Barker eventually crashed his vehicle, fled on foot, and was arrested in a field; (9) officers recovered 258 grams of marijuana in Barker's vehicle; (10) the passenger-side window of Barker's vehicle was rolled all the way down; (11) the morning after Barker's arrest, on the route driven by Barker, police discovered over 27 grams of powder cocaine in a plastic bag, a total of 6.83 grams of crack cocaine in two separate baggies, and three bundles containing a total of thirty purple and green pills that weighed 7.8 grams and tested positive for methamphetamine; and (12) the drugs were thrown out of Barker's passenger-side window as he fled from police. Barker concedes that "these facts probably support a rational inference that he physically possessed the drugs in Minnesota."

For the evidence to be sufficient, "it must also be true that there are no other reasonable rational inferences that are inconsistent with guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). Barker contends that one rational hypothesis inconsistent with guilt is that Andre physically held the drugs before tossing them out of the passenger-side window, and, therefore, only Andre actually possessed the drugs in Minnesota. We

are not persuaded. The circumstances proved are consistent with the hypothesis that the drugs found in the ditch were the drugs that Barker purchased in Chicago. Because Barker and Andre fled the police to provide them time to dispose of the drugs, stopped the vehicle to gather the drugs in the trunk, threw the drugs out of the window in haste, and ultimately crashed the vehicle in a ditch before they were able to dispose of the marijuana, it is not a rational hypothesis that Andre acted alone in the disposal of the drugs.[3] Accordingly, we affirm the district court's decision that the evidence was sufficient to find actual possession.

B. Intent to Sell Marijuana

Barker was convicted of fifth-degree sale of a controlled substance in violation of Minn. Stat. § 152.025, subd. 1(a)(1) (2014). To convict Barker, the state was required to prove that he possessed marijuana with the intent to sell. *See id*.; *see also* Minn. Stat. § 152.01, subd. 15a(3) (2014) (including intent to sell within the definition of sale). Barker argues that the evidence was insufficient to convict him of possession with intent to sell because there is a rational inference from the circumstances proved that is inconsistent with guilt and instead shows possession solely for personal use. As is typical, the state relied on circumstantial evidence to prove Barker intended to sell the marijuana he possessed.

[3] Though the parties in this case are disputing "actual" control, we find Minn. Stat. § 152.028, subd. 2 (2018) informative, which provides that "[t]he presence of a controlled substance in a passenger automobile permits the fact finder to infer knowing possession of the controlled substance by the driver or person in control of the automobile when the controlled substance was in the automobile." This further supports the state's case regarding Barker's possession of the marijuana, which was found in the Charger that Barker drove that night.

See Porte, 832 N.W.2d at 309 ("Intent to sell or distribute controlled substances typically is proved with circumstantial evidence.").

Because a conviction based on circumstantial evidence warrants "heightened scrutiny" we apply a two-part test when reviewing the sufficiency of the evidence. *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015). The first step is identifying the circumstances proved. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). Circumstantial evidence tending to show an intent to sell "includes evidence as to the large quantity of drugs possessed, evidence as to the manner of packaging, and other evidence." *State v. White*, 332 N.W.2d 910, 912 (Minn. 1983). Here, the circumstances proved include the following: (1) A.S. testified that Barker had previously sold marijuana and cocaine; (2) Barker went to Chicago to purchase drugs to bring back to Minnesota; (3) A.S. saw Barker purchase ecstasy; (4) A.S. saw rock-like substances stored in Barker's rental car; (5) A.S. saw marijuana in Barker's rental car; and (6) officers testified that the amounts of drugs found in this case were not consistent with personal use.

The next step is to evaluate "independently the reasonableness of all inferences that might be drawn from the circumstances proved" including inferences consistent with a hypothesis other than guilt. *Hanson*, 800 N.W.2d at 622. Barker argues that the circumstances proved are consistent with other rational hypotheses besides guilt because, unlike other intent to sell cases, he was not found with the marijuana packaged for sale, small plastic bags, log lists, or scales. *See e.g.*, *State v. Lozar*, 458 N.W.2d 434, 441 (Minn. App. 1990) (holding that 50 pounds of marijuana, a large number of small packages containing marijuana, a scale, plastic bags, and over $5,000 in cash was sufficient evidence

to support the jury's finding of intent to sell), *review denied* (Minn. Sept. 28, 1990); *State v. Collard*, 414 N.W.2d 733, 735-36 (Minn. App. 1987) (holding that a Tupperware container holding over $2,000 in cash, an address book with names of known drug dealers, and three packets of cocaine was sufficient evidence to support the jury's finding of intent to sell). Additionally, there was evidence presented at trial that Barker was a "regular, high volume marijuana user."

However, the evidence presented, viewed in the light most favorable to the verdict, indicates Barker possessed the marijuana for sale instead of for personal use. A.S.'s testimony that Barker sells marijuana and cocaine is one piece of evidence that cannot be tailored to fit the hypothesis that Barker possessed the marijuana for personal use only. Because this court must consider the evidence as a whole and not examine each piece in isolation, *Andersen*, 784 N.W.2d at 332, we affirm the district court on this issue.[4]

[4] Barker asserts that the district court did not make a factual finding specifically regarding the intent to sell the marijuana in its order. But the district court found:

> The packaging of the controlled substances in separate packages containing uniform numbers of methamphetamine tablets and roughly uniform weights of cocaine is circumstantial evidence that it was packaged for sale. This, in conjunction with [A.S.]'s testimony that Barker told her he was going to Chicago to bring back drugs to sell in Faribault and testimony from several DTF officers that these amounts of controlled substances are not typical for personal use, is sufficient to prove that Defendant intended to sell the controlled substances.

The district court's findings encompass all of the controlled substances in this case, including the marijuana.

II. Sentencing Decision

Barker challenges his sentence on the ground that the state improperly relied on out-of-state convictions in his criminal-history score calculation. For a felony offense, the Minnesota Sentencing Guidelines generally provide for a presumptive sentence which is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.13 (2015). Accordingly, a district court "must pronounce a sentence . . . within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure." *Id*. 2.D.1 (2015); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). In order to calculate the appropriate presumptive sentence, the district court looks to the severity level of the offense of conviction and the defendant's total criminal-history score. Minn. Sent. Guidelines 2.B (2015).

A. Criminal-History Score

This court will not reverse a district court's criminal-history score determination absent an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). A district court must take into consideration a defendant's out-of-state convictions when calculating the defendant's criminal-history score, Minn. Sent. Guidelines 2.B.5 & cmt. 2.B.502 (2015), but the state must first "lay[] foundation for the court to do so," *Maley*, 714 N.W.2d at 711. The state has the burden of proving sufficient facts to justify consideration of a defendant's out-of-state convictions at sentencing and "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." *Maley*,

714 N.W.2d at 711. A preponderance of the evidence means a greater weight of the evidence or that a claim is more likely true than not. *Id*. at 712.

Here, the district court determined that Barker had seven criminal-history points for the following offenses: (1) 2016 Minnesota third-degree assault conviction; (2) 2010 Minnesota second-degree assault conviction; (3) 2010 Minnesota felon-in-possession conviction; (4) 2006 Illinois felon-in-possession conviction; (5) 2005 Illinois delivery of cannabis conviction; and (6) two 2002 Illinois aggravated battery convictions. Barker contends that the state did not sufficiently prove that three of his prior Illinois convictions would constitute felonies in Minnesota.

Courts have examined whether the state sufficiently proved out-of-state convictions by analyzing the documentation presented. *Compare State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983) (holding that the state is not required to supply certified copies of the conviction when it presented considerable documentation) *and State v. Jackson*, 358 N.W.2d 681, 683 (Minn. App. 1984) (determining that the state sufficiently proved an out-of-state conviction when a probation officer provided the district court with advice and unsworn testimony regarding the conviction in lieu of a certified copy of the out-of-state conviction) *with Maley*, 714 N.W.2d at 710-13 (determining that state did not sufficiently prove the out-of-state convictions when it did not provide any admissible evidence under rule 1005 but relied solely on a pre-sentence investigation (PSI)). Here, consistent with *Griffin*, the state did present "considerable documentation" including the PSI report detailing the convictions and the certified copies of the convictions from Illinois. 336

N.W.2d at 525. However, the state did not present evidence which described Barker's underlying conduct for the convictions.

The state argues that Barker places an additional burden on the state to prove via a "mini-trial" that the underlying conduct constitutes a felony in Minnesota, even though Barker was already convicted in Illinois. In *Hill v. State*, the supreme court stated "[w]e are not prepared at this point . . . to say that in every case involving an out-of-state or foreign conviction the parties must engage in a 'mini-trial' to determine what the conduct was underlying the foreign or out-of-state conviction." 483 N.W.2d 57, 61 (Minn. 1992). The supreme court explained that the district court should consider "the offense definition . . . the nature of the offense and the sentence received by the offender." *Id.* (quotation marks omitted).

Barker contends that this court must consider the Minnesota statute at the time the foreign offense was committed. The Minnesota Sentencing Guidelines in 2015 provide, "[t]he offense definitions in effect when the offense was committed govern the designation of non-Minnesota convictions as felonies, gross misdemeanors, or misdemeanors." Minn. Sent. Guidelines 2.B.5.b. However, the guidelines were amended in 2016 to read "offense definitions in effect when the current Minnesota offense was committed govern the designation of non-Minnesota convictions as felonies, gross misdemeanors, or misdemeanors." *Id.* 2.B.5.b. (2016). Because the Minnesota Supreme Court considers this amendment to be a "clarifying amendment," we compare the Illinois statutes to the Minnesota statutes in effect at the time of the current Minnesota offense, which in this instance is 2014. *See State v. Scovel*, 916 N.W.2d 550, 557 (Minn. 2018). ("[W]hen the

Commission made the 2016 changes to clarify the text of Guidelines 2.B.5.b, it remarked that this was a clarifying amendment to make clear 'that the policy for classifying non-Minnesota prior offenses is . . . based on offense definitions and sentencing policies in effect when the current Minnesota offense was committed.'").

1. 2006 Illinois Conviction

In 2006, Barker was convicted of violating 720 ILCS 5/24 1.1(a), which provides:

> It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction.

The state asserts that this mirrors Minn. Stat. § 624.713, subd. 2(b) (2014), which prohibits possession of a firearm by an ineligible person. Barker argues that the Illinois statute prohibits possession of both weapons[5] and firearms, and is therefore more expansive than the Minnesota statute. Barker asserts that because the state did not prove what type of weapon he possessed in 2006, the state did not prove his conduct would have violated Minn. Stat. § 624.713, subd. 2(b).

The state argues that the Illinois and Minnesota statutes are similar because a violation of either statute is a felony, each provide a sentence greater than one year, and the nature of the offenses is similar. The PSI report provided to the district court lists the

[5] Section 24-1 of the Illinois act prohibits possession of numerous weapons, including a "bludgeon, black-jack, slung-shot, sand-club, sand-bag, metal knuckles . . . throwing star, or any knife . . . stun gun or taser or any other dangerous or deadly weapon or instrument of like character."

2006 conviction as a felony-level conviction and the certified statement of conviction that the state presented at the sentencing hearing lists the charge as "FELON POSS/USE FIREARM PRIOR." We hold that based on the description of the charge on the certified statement of conviction, as well as Barker's three-year sentence, the district court did not abuse its discretion by assigning 1.5 criminal-history points for the 2006 conviction.

2. 2005 Illinois Conviction

In 2005, Barker was convicted of violating 720 ILCS 550/5(C), which provides that:

> It is unlawful for any person knowingly to manufacture, deliver, or possess with intent to deliver, or manufacture, cannabis. Any person who violates this section with respect to . . . more than 10 grams but not more than 30 grams of any substance containing cannabis is guilty of a Class 4 felony.

The state argues that this mirrors Minn. Stat. § 152.025, subd. 1(a)(1), which prohibits unlawfully selling marijuana, except a small amount for no remuneration. A small amount of marijuana is defined as "42.5 grams or less." Minn. Stat. § 152.01, subd. 16 (2014). Barker argues that the two statutes are different because the 10-30 grams he was convicted of "manufactur[ing], deliver[ing], or possess[ing] with intent to deliver, or manufacture" would be considered a small amount in Minnesota. The distribution of a small amount of marijuana without reference to remuneration would be considered a petty misdemeanor in Minnesota. Minn. Stat. § 152.027, subd. 4 (2014).

Though the state presented a certified copy of the conviction, there is no additional evidence in the record to determine if Barker received remuneration for the drugs. Barker's defense attorney at the sentencing hearing argued that the "State has [not] produced anything more on that to show that by a preponderance of the evidence that that would

have been a felony in Minnesota" and that "the Court cannot just rely on the unsubstantiated, unproven statements in either the PSI or the State's sentencing memorandum to determine those out-of-state convictions." In *State v. Outlaw*, this court reversed the district court's determination regarding out-of-state convictions because the record did not contain any additional evidence regarding the offenses. 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Here, the state did not prove Barker received remuneration for distribution of cannabis in Illinois. Because the state did not prove by a preponderance of the evidence that Barker would have been convicted of a felony in Minnesota, we reverse the district court's decision to assign .5 criminal-history points for the 2005 conviction.

In *Outlaw*, this court remanded the case back to the district court in order to determine if the appellant had the requisite number of prior convictions to support the aggravated sentence. *Id*. at 356. Because the appellant did not object when the district court initially determined that the out-of-state convictions were felonies, on remand "respondent [was] permitted to further develop the sentencing record so that the district court [could] appropriately make its determination." *Id*. However, here, Barker's defense counsel made multiple objections at the sentencing hearing. Therefore, remand to the district court to further develop the record is inappropriate in this case.

3. 2002 Illinois Convictions

In 2002, Barker was convicted of six counts of aggravated battery in violation of 720 ILCS 5/12-4(B)(6) (2002), which provides:

> In committing a battery, a person commits aggravated battery if he or she:
>
> Knows the individual harmed to be a peace officer, a community policing volunteer, a correctional institution employee, an employee of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, or a fireman while such officer, volunteer, employee or fireman is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer, volunteer, employee or fireman from performing official duties, or in retaliation for the officer, volunteer, employee or fireman performing official duties, and the battery is committed other than by the discharge of a firearm.

The state presented a certified copy of the conviction. The state claimed this was similar to Minn. Stat § 609.2231, subd. 1(c) (2014):

> Whoever commits either of the following acts against a peace officer is guilty of a felony and may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than $6,000, or both: (1) physically assaults the officer if the assault inflicts demonstrable bodily harm; or (2) intentionally throws or otherwise transfers bodily fluids or feces at or onto the officer.

Barker argues that the Minnesota and Illinois statute differ because the Illinois statute criminalizes more conduct than the Minnesota statute, and the Minnesota statute requires infliction of demonstrable bodily harm which is not required under the Illinois statute. Again, because the state did not introduce any evidence regarding the underlying facts of the convictions, we reverse the district court's decision to assign .5 criminal-history points for each of the 2002 convictions.

B. Upward Durational Departure Basis

The district court committed Barker to the Commissioner of Corrections for a period of 316 months, an upward durational departure, under both Minnesota Statutes § 609.1095, subdivisions 2 and 4. The district court further determined that Barker is not entitled to "good time" under Minnesota Statutes § 609.1095, subdivision 3. We review a district court's decision of whether to depart from the sentencing guidelines for an abuse of discretion. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). We will reverse the departure decision "only if the reasons for the departure are improper or inadequate and there is insufficient evidence to justify an aggravated sentence for the offense of which the defendant was convicted." *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009). Whether a particular reason for an upward departure is proper is a question of law, which we review de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

1. Minn. Stat. § 609.1095, subd. 4, Does Not Support Upward Departure

Here, the district court based its upward durational departure, in part, on its determination that Barker's present offense was a part of "a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4 (providing for an upward durational departure if an offender has five or more prior felony convictions and the present offense was part of a pattern of criminal conduct). However, because the district court improperly considered the 2005 Illinois delivery of cannabis conviction and the two 2002 Illinois aggravated battery convictions, Barker does not have the requisite five felony convictions to support

departure under this subdivision. We determine that the upward dispositional departure, based upon Minn. Stat. § 609.1095, subd. 4, is improper.

2. Minn. Stat. § 609.1095, subd. 2, Supports Upward Departure

We turn to the district court's analysis under the "dangerous offender" aggravating factor pursuant to Minn. Stat. § 609.1095, subd. 2. That statute authorizes an upward sentencing departure for a violent felony conviction, up to the statutory maximum sentence, when an offender, who is at least 18 years old, has two or more prior convictions for violent crimes, and the fact-finder determines that the offender is a danger to public safety. *See id*. The fact-finder may determine that the offender is a danger to public safety based upon "the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications." *Id*.

"When a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors." *Vance*, 765 N.W.2d at 395 (quoting *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 2054 (1996)). In making this determination, we consider "the weight given to the invalid factor[s] and whether any remaining factors found by the court independently justify the departure." *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), *review denied* (Minn. May 18, 2010) (quotation omitted). We will affirm the sentence if we conclude that the district court would have departed based on other aggravating factors supported by

its findings, even when some reasons are improper. *Dillon*, 781 N.W.2d at 595.[6] A district court's decision to depart from the sentencing guidelines based on proper grounds is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001).

Here, the district court found that Count I, importing a controlled substance across state borders, is a violent felony because it is a crime under chapter 152 that is punishable by a maximum sentence of 15 years or more. *See* Minn. Stat. § 609.1095, subd. 1(d) (2014). In accordance with Minn. Stat. § 609.1095, subd. 2, the district court found that Barker was an adult when he committed the crime, has two or more prior convictions for violent crimes, and is a danger to public safety based upon "the frequency of [Barker's] past criminal behavior and his lengthy involvement in crime." We determine that the district court articulated the statutory requirements under subdivision 2. Even excluding all of Barker's Illinois convictions, he still has three Minnesota felony convictions which all qualify as violent crimes: (1) 2010 conviction for ineligible person in possession of a firearm; (2) 2010 conviction for second-degree assault; (3) and 2016 conviction for third-degree assault. *See id*. Because the district court stated a valid reason for departure, which independently justified departure up to the statutory maximum of 35 years, we determine that the district court did not abuse its discretion in imposing Barker's 316-month sentence.

[6] *See also State v. Losh*, 721 N.W.2d 886, 895 (Minn. 2006) (holding that a departure will be affirmed when there is sufficient evidence to justify the departure even when the district court's reasons are improper or inadequate).

3. Minn. Stat. § 609.1095, subd. 3, Does Not Apply

At the sentencing hearing, the district court found that Barker was "not entitled to good time or supervised release because [he has] two or more prior felony convictions of violent crime pursuant to Minnesota Statute 609.1095, subdivision 3." Minn. Stat. § 609.1095, subd. 3, provides:

> Unless a longer mandatory minimum sentence is otherwise required by law or the court imposes a longer aggravated durational departure under subdivision 2, a person who is convicted of a violent crime that is a felony must be committed to the commissioner of corrections for a mandatory sentence of at least the length of the presumptive sentence under the Sentencing Guidelines if the court determines on the record at the time of sentencing that the person has two or more prior felony convictions for violent crimes. The court shall impose and execute the prison sentence regardless of whether the guidelines presume an executed prison sentence.
>
> Any person convicted and sentenced as required by this subdivision is not eligible for probation, parole, discharge, or work release, until that person has served the full term of imprisonment imposed by the court, notwithstanding sections 241.26, 242.19, 243.05, 244.04, 609.12, and 609.135.

Because the district court "imposed a longer aggravated durational departure under subdivision 2," Minn. Stat. § 609.1095, subd. 3, does not apply. The district court erred in its determination that Barker is not entitled to "probation, parole, discharge, or work release." Accordingly, we remand to the district court for further proceedings in accordance with this opinion.

In sum, we conclude that the district court erred in assigning criminal-history points for three of the four Illinois convictions and we reverse the departure under Minn. Stat. § 609.1095, subd. 4; however, we determine that the 316-month sentence is appropriate

under Minn. Stat. § 609.1095, subd. 2. Because this distinction renders Minn. Stat. § 609.1095, subd. 3 inapplicable, we remand to the district court to amend the sentencing order reinstating early release eligibility.

III. Barker's Additional Pro Se Arguments

Barker raises additional pro se arguments in his supplemental brief, including that: (1) there was insufficient evidence to establish that he crossed the Minnesota border while in possession of a controlled substance; (2) his controlled substances conviction and fleeing a police officer conviction arise out of a single behavioral incident and the district court should not have sentenced on both; and (3) the district court miscalculated the criminal-history points by not rounding down the score for each offense before totaling the points.

Barker's sufficiency-of-the-evidence argument fails for two reasons. First, in Barker's statement of the facts he tells a story that was not presented to the district court. At trial, Barker chose not to testify in his own defense, and therefore this version of events was not presented to the district court for consideration. Because an appellate court will not consider matters not argued to and considered by the district court, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996), this court need not consider arguments pertaining to Barker's newly presented version of events. Second, this court defers to the district court's credibility determinations. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Even if the district court had heard Barker's version of events, the district court found that A.S.'s testimony was credible and included much of her testimony in its factual findings. Therefore, we affirm the district court's determination

that the state presented sufficient evidence to establish Barker possessed the controlled substances in Minnesota.

Barker's argument that two of his convictions—the controlled substances conviction and fleeing a police officer conviction—arise out of a single behavioral incident is not persuasive. The district court's decision whether multiple offenses were committed as part of a single behavioral incident under Minn. Stat. § 609.035 so as to preclude multiple sentencing entails factual determinations that will not be reversed unless clearly erroneous. *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). When the facts are not in dispute, the decision whether multiple offenses are part of a single behavioral incident presents a question of law that is reviewed de novo. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). Minn. Stat. § 609.035, subd. 5 (2014) provides that a conviction of section 609.487 "is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct." Therefore, Barker's argument that the district court erred is unavailing.

Finally, Barker's argument related to his criminal-history score calculation is not persuasive. Barker argues that the district court miscalculated his criminal-history points by not rounding down the score for each offense before totaling the points together. The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). The Minnesota Sentence Guidelines provide that "[i]f the sum of the weights results in a partial point, the point value must be rounded down to the whole number." 2.B.03.1.i (2015). Based upon the clear language of the guidelines,

we determine that the district court did not abuse its discretion by not rounding down each point before summing all of the points together.

Affirmed in part, reversed in part, and remanded.