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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0410**

State of Minnesota,
Respondent,

vs.

Jose Acension Lopez,
Appellant.

**Filed January 13, 2020
Reversed and remanded
Rodenberg, Judge**

Renville County District Court
File No. 65-CR-18-176

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

David Torgelson, Renville County Attorney, Olivia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal after he was found guilty of domestic assault and domestic assault by strangulation, appellant Jose Lopez argues that his sentence must be reversed

and remanded for resentencing because the district court erred in calculating his criminal history score. We reverse and remand.

FACTS

On June 5, 2018, the state charged appellant in a three-count complaint for his conduct directed against J.A. on June 3, 2018. The complaint charged appellant with one count of felony domestic assault, one count of threats of violence,¹ and one count of domestic assault by strangulation.

Appellant waived his right to a jury trial, and the case was tried to the court. At trial, J.A. testified that, on the evening of June 3, 2018, she and appellant argued. J.A. testified that appellant strangled her, put a pillow over her face, hit her, and dragged her by her hair. J.A. testified that she was three months pregnant at the time.

Appellant testified on his own behalf and stated that he and J.A. often engaged in verbal arguments. He testified that, on June 3, 2018, J.A. became upset that appellant had made contact with an ex-girlfriend. Appellant denied strangling J.A., putting a pillow over her face, hitting her, or pulling her hair. Instead, appellant testified that he left their shared residence until J.A. calmed down, and returned only to go to bed.

The district court found appellant guilty of domestic assault and domestic assault by strangulation. It found appellant not guilty of the charge of threats of violence.

¹ The complaint, the district court's written findings after the trial, and the warrant of commitment each describe this offense as "Terroristic Threats—Reckless Disregard Risk." The legislature amended section 609.713 in 2015 to identify this offense as "Threats of Violence." Minn. Stat. § 609.713 (Supp. 2015); 2015 Minn. Laws ch. 21, art. 1, § 109, at 234. This alteration of the offense designation does not affect the issue in this appeal.

Sentencing worksheets were prepared and filed with the district court before appellant's sentencing hearing. The worksheet concerning the domestic-assault charge included appellant's two prior felony criminal history points and one custody-status point, for a total of three criminal history points. The worksheet concerning the domestic-assault-by-strangulation charge assigned appellant one additional point for the domestic-assault charge that the district court had found the state to have proved, for a total of four criminal history points.

The district court convicted appellant of both proved charges, but sentenced appellant only on the domestic-assault-by-strangulation conviction, using a criminal history score of four.

This appeal followed.

D E C I S I O N

Appellant argues on appeal that the district court erred in calculating his criminal history score. The state declined to file a responsive brief. We must therefore resolve the appeal by a careful review of the record as constituted, but without the benefit of the state's input. Minn. R. Civ. App. P. 142.03.

The supreme court has held that "a sentence based on an incorrect criminal history score is an illegal sentence . . . [and] a defendant may not waive review of his criminal history score calculation." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007); *see State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008) (providing that an unauthorized sentence includes one that is calculated on an incorrect criminal history score).

A person being sentenced under the Minnesota Sentencing Guidelines is assigned one criminal history point “to . . . each felony conviction, provided that a felony sentence was stayed or imposed before the current sentencing.” Minn. Sent. Guidelines 2.B.1 (2016); *see* Minn. Sent. Guidelines cmt. 2.B.101 (2016) (explaining the “basic rule . . . that the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing”). Pursuant to *State v. Hernandez*, a district court sentencing a defendant on more than one offense on the same day may count each prior conviction in the defendant’s criminal history score when sentencing subsequent offenses. 311 N.W.2d 478, 481 (Minn. 1981); Minn. Sent. Guidelines 2.B.1.e (2016).

In this case, the district court convicted appellant of both of the domestic-assault-related offenses, but only sentenced appellant on the domestic-assault-by-strangulation conviction. Domestic assault by strangulation is a severity-level-four offense. Minn. Sent. Guidelines 5.A. (2016). The district court did not sentence appellant on the domestic-assault conviction. Therefore, appellant’s proper criminal history score relative to the domestic-assault-by-strangulation conviction was three. *See* Minn. Sent. Guidelines 2.B.1. But the district court improperly included an additional criminal history point for the domestic-assault conviction on which appellant was not sentenced. Based on this miscalculation, the district court erroneously sentenced appellant using the incorrect criminal history score.

Because the district court sentenced appellant using a criminal history score of four and not three, we reverse and remand to the district court to resentence appellant using the correct criminal history score.²

Reversed and remanded.

² Appellant also argues that “even if [appellant] had received sentences on both offenses, the district court still erred by including the domestic-assault offense in [appellant]’s criminal history score because it would not have been sentenced first in time,” citing Minn. Sent. Guidelines 2.B.1.e. Because the district court only sentenced appellant on the domestic-assault-by-strangulation conviction, we do not address this issue. Our holding here is limited to correcting the erroneous calculation of appellant’s criminal history score. How the district court sentences appellant on remand is for the district court to decide, within the parameters of the law.