STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0629

State of Minnesota,
Respondent,

vs.

Alexander John Cookson,
Appellant.

Filed June 22, 2020
Affirmed in part, reversed in part, and remanded
Bryan, Judge

Clay County District Court
File No. 14-CR-17-4600

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

Brian J. Melton, Clay County Attorney, Pamela Foss, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Reyes, Judge; and Bratvold, Judge.

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

BRYAN, Judge

Appellant argues that the district court committed the following two errors: (1) the district court answered a question from the jury without first consulting the parties, and

(2) the district court included an out-of-state conviction in appellant's criminal-history score. We affirm the jury verdict because the trial error was harmless beyond a reasonable doubt. In addition, because the state did not establish that the out-of-state conviction was equivalent to a felony in Minnesota, we reverse the calculation of appellant's criminal-history score and remand that issue to the district court.

FACTS

In 2017, respondent State of Minnesota charged appellant Alexander John Cookson with third-degree criminal sexual conduct, and the case proceeded to a jury trial. During deliberations, the jury submitted a question to the district court, asking whether a witness testified to a particular fact. Without convening the parties or consulting with defense counsel, the district court instructed the jury to rely on their memory of the evidence. The jury returned a guilty verdict and the case proceeded to sentencing. At sentencing, the district court equated an out-of-state conviction to a felony in Minnesota over Cookson's objection. This appeal followed.

A. Evidence at Trial and Jury Question

In December 2017, Cookson was serving a jail sentence, but was allowed to leave the jail during the day to go to work. On the day of the incident, Cookson's girlfriend, S.B., picked him up and took him to work at his automotive shop. When it came time to drive Cookson back to jail, Cookson got into the front passenger seat of S.B.'s four-door Chrysler Pacifica and had S.B. park behind the shop. According to S.B., Cookson was upset with her because she did not spend time with him at the shop that day. S.B. told Cookson they needed to get back to the jail, but Cookson refused to let them leave and kept

trying to kiss her. Cookson went to the second row of S.B.'s vehicle, grabbed S.B. by her coat and pulled her into the second row. Cookson wanted to have sexual intercourse, but was unable to keep an erection. Cookson then grabbed S.B. by the head and forced his penis in her mouth. S.B. continually told Cookson "no," that she didn't want to, and to stop. Eventually, Cookson ejaculated on S.B.'s coat sleeve and a laundry bag.

On the day of the incident, Cookson's friend, B.A., was helping out at the shop.[1] While Cookson and S.B. were in her vehicle, B.A. walked out of the shop and toward S.B.'s vehicle. B.A. testified unequivocally on direct examination that he did not walk all the way up to the Pacifica and that he could not see anybody in the vehicle because of its tinted windows. In addition, B.A. testified that he heard Cookson say that it would be just another minute and then he would come in and get B.A. when it was time to leave. At that point, B.A. walked back into the shop. B.A. reiterated this testimony on cross-examination, explaining that Cookson said it will be just a minute, that B.A. did not say anything to prompt Cookson's statement, that Cookson must have seen him coming toward to the vehicle, and that he did not get within 10 feet of the vehicle.

After the alleged assault, S.B. drove to the side of the shop and B.A. got in the vehicle with S.B. and Cookson. B.A. could tell something was wrong by the look on S.B.'s face. S.B. dropped herself off at her apartment, and B.A. drove Cookson back to jail. S.B. testified that Cookson called her on his way back to jail to say he was sorry for what

[1] S.B. testified that she and Cookson started dating in the late spring of 2017 and that Cookson was her boyfriend on the date in question. B.A. testified that he and S.B. began a romantic relationship in December 2017 and were still together at the time of the trial.

happened and that he did not mean for it to happen. Later that night, S.B. told her daughter and B.A. what happened with Cookson. Both B.A. and S.B.'s daughter testified that S.B. was distraught, and that they urged her to go to the police.

The day after the incident, S.B. and her daughter spoke with Detective Hicks and provided him with S.B.'s coat and the laundry bag. S.B. told Hicks that Cookson forced her to perform oral sex inside her vehicle, and that Cookson ejaculated on her coat sleeve and the laundry bag. Hicks later brought S.B.'s coat and the laundry bag to the Minnesota Bureau of Criminal Apprehension (BCA). The BCA did not test the laundry bag, but did find semen on the coat sleeve that matched Cookson's DNA.

Hicks later obtained a recorded statement from Cookson which was played during the trial. In the statement, Cookson stated that he was adamant that he and S.B. did not have sex: "We fooled around but we didn't have sex. Nothing entered her body at all in any way, shape, or form. Go look for semen, go do whatever you need to do because there's not gonna be any. And I'm adamant about that." Cookson also stated that B.A. walked up to the vehicle and knocked on the door. At that time, Cookson stated that he and S.B. were just sitting in the car. Cookson also stated that he and S.B. kissed and fooled around, but he could not get an erection. Cookson told Hicks that SB said no, but maintained that it was only because of the location and the surroundings. After his arrest, Cookson also made several calls to S.B. from jail, some of which were presented to the jury. In two calls to S.B., Cookson stated that he was sorry and felt horrible about what happened. Cookson also stated, "You've never turned me down. So like I didn't think it was because of actually not wanting to, I thought it was because you were worried about

the people." In the other calls, Cookson told his sister to offer S.B. money or a house to make this situation go away.

On cross-examination, Hicks was asked about the statement that S.B. gave to him. While he did not recall her saying that she wanted to get away from Cookson, he thought that S.B. said that B.A. walked up to the car and knocked on the window:

> Q. Now, Detective, you spoke with [S.B.] on December l4, is that correct?
> A. Correct.
> Q. And she came into your office? You recorded it?
> A. Yes.
> Q. You listened to that recording before court today?
> A. Not today. I have listened it to throughout the course of this investigation.
> Q. Have you listened to it in preparation for trial today?
> A. Yes, I have.
> Q. And during that conversation you had with her, she had told you that she had been trying to get away from him, is that correct?
> A. I can't specifically say right now. She had told me that specifically she was trying to get away from him?
> Q. Get away from the relationship?
> A. If we can refer to the transcribed copy of the interview at the time ——
> Q. You don't remember?
> A. Not off the top of my head, no.
> Q. And then, Detective, she also told you that [B.A.] had come to the door, knocked on the window; is that correct?
> A. As I recall, that is what she said, yes.

During its deliberations, the jury wrote a note to the judge asking about whether a witness testified to a particular fact. The note read, "Det Hicks testimony: Did he testify that [B.A.] knocked on window of car." The district court did not contact the parties or consult with counsel. The district court also did not meet with the jurors to deliver his

answer. Instead, the district court wrote a response and provided the following written answer to the jury: "You are to rely on your memory and recollection of the testimony." Upon learning that the jury had reached a verdict, the district court apprised the parties of the jury's question and stated "because of the nature of the question I didn't bring the parties back in. [My response] would have been the Court's position in any event." The jury found Cookson guilty.

B. Calculation of Appellant's Criminal-history score

Prior to sentencing, Clay County Department of Corrections submitted a presentence investigation report (PSI). The PSI included a felony conviction in North Dakota and concluded that Cookson had five criminal history points. Cookson contested this calculation and requested that he be sentenced with a criminal-history score of four points. In response, the state filed a memorandum and three marked exhibits consisting of the information, the police report, and the sentencing disposition. None of the exhibits were certified records. The exhibits indicate that in January 2015, the State of North Dakota charged Cookson with reckless endangerment in violation of N.D. Cent. Code § 12.1-17-03 (2013). The exhibits allege that Cookson "chased and rammed head on [another] vehicle while occupied, the approached [said] vehicle and punched the window," and by doing so Cookson "willfully created a substantial risk of serious bodily injury or death to another under circumstances manifesting extreme indifference to the value of human life." Cookson pleaded guilty in North Dakota district court and was sentenced to serve four years at the Department of Corrections and Rehabilitation. The district court reviewed the exhibits and determined that the offense would be the equivalent of a second-

degree assault in Minnesota. The district court sentenced Cookson using five criminal history points.

D E C I S I O N

I. Answer to the Jury Question

Cookson argues he is entitled to a new trial because the district court erred in answering the jury's question without convening the parties. We agree that the district court erred. However, because the jury verdict was surely unattributable to this error, the district court's error was harmless beyond a reasonable doubt.

"[T]he Sixth Amendment to the United States Constitution grants a defendant the right to be present at all stages of trial." *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001). The Minnesota Rules of Criminal Procedure dictate that a defendant must be present at every stage of the trial including "any jury questions dealing with evidence or law." Minn. R. Crim. P. 26.03, subd. 1(1)(f). A district court's response to a jury question in the absence of a defendant, without obtaining a waiver, is a violation of that defendant's constitutional right to be present and rule 26.03. *Sessions*, 621 N.W.2d at 756. But, "a new trial is warranted only if the error was not harmless." *Id.* "If the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt."[2] *Id.* "When considering whether the erroneous exclusion of a defendant from judge-jury

[2] Appellant argues that this court should review the district court's conduct for an abuse of discretion. Respondent refers to an abuse of discretion in its standard-of-review section, but also cites *State v. Sessions* and acknowledges that the district court's response to the jury in Cookson's absence violated his constitutional rights. We follow *Sessions* and apply the constitutional standard.

communications constitutes harmless error, we consider the strength of the evidence, and substance of the judge's response." *Id.* (citation omitted). For example, in *Cooper v. State*, "the jury sent a note to the trial judge requesting to review a state's witness' testimony." 745 N.W.2d 188, 191 (Minn. 2008). In the absence of Cooper and his counsel, "[t]he judge responded to the note in writing, stating that no transcript was available and that the jury members would have to rely on their own memories." *Id.* The Minnesota Supreme Court held that the error was harmless beyond a reasonable doubt because the responses were neutral, appropriate, and would have been the same even in Cooper's presence. *Id.* at 192; *see also, e.g.*, *Mckenzie v. State*, 687 N.W.2d 902, 906 (Minn. 2004) (concluding that the district court's error responding to jury questions in the absence of the defendant was harmless beyond a reasonable doubt because the jury received no new information and the responses given were appropriate and neutral).

Cookson argues that the district court's error caused harm because it denied him the opportunity to request that the district court read the transcript of Hicks' testimony to the deliberating jury. We disagree because of the strength of the state's evidence and because of the substance of the district court's response.

First, we consider Cookson's argument in light of the state's evidence. Cookson asserts that listening to the transcript of Hicks' testimony would have changed the outcome of the case because after hearing Hicks' testimony a second time, the jury would conclude that S.B. lied about the incident it in order to preserve her relationship with B.A. We cannot accept this attenuated argument. The jury heard S.B.'s detailed testimony and the corroborating testimony of her daughter and B.A. In addition, the jury considered forensic

evidence that the BCA found Cookson's semen where S.B. had identified it would be. The district court also admitted recordings of Cookson denying any sexual contact with S.B. on that date. In addition, in the recorded statement Cookson said he was "adamant" that law enforcement could "[g]o look for semen, go do whatever you need to do because there's not gonna be any." The jury also heard other recordings of Cookson apologizing to S.B. for his actions and acknowledging that she said she did not want to have sex, but explaining that he misinterpreted what S.B. meant. Given the strength of this evidence, we cannot agree that hearing Hicks' testimony regarding whether B.A. knocked on the vehicle calls into question S.B.'s credibility.

Next, we analyze the substance of the district court's response. The district court told the jury members they were to rely on their memory and recollection of the testimony. This is an appropriate response. *Sessions*, 621 N.W.2d at 757 ("In response to the jury's question . . . the court appropriately advised jurors that they were to decide the case based upon their own collective recollection of the evidence"). Further, the district court did not give the jury any new information, and the response neither favored Cookson nor the state. The district court also stated that the response to the question would have been the same had Cookson and his counsel been present. In short, the substance of the district court's response is nearly identical to that in *Cooper* and *Mckenzie*. Thus, we reach the same conclusion as the supreme court in those two cases. Because the district court's response to the jury question was harmless beyond a reasonable doubt, we affirm the jury's verdict.

II. Criminal-History Score

Cookson argues that the district court erred in calculating his criminal-history score because it counted an out-of-state conviction as equivalent to a felony in Minnesota. Because the state did not establish that the facts underlying the conviction would have constituted a felony in Minnesota, we reverse the sentence and remand to the district court for resentencing.

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. Guidelines 2.B.5.a (Supp. 2017). 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. Guidelines 2.B.5.b (Supp. 2017). 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). "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 would constitute a felony in Minnesota." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). This court reviews 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).

In this case, Cookson argues that the state failed to prove by a fair preponderance of the evidence that the facts underlying his North Dakota conviction[3] for reckless endangerment would amount to a felony under Minnesota law.[4] Clearly, the allegations in the three sentencing exhibits, if proved, could support a felony, second-degree assault conviction in Minnesota. But the guidelines refer to convictions, not charges or police reports. Minn. Sent. Guidelines 2.B.5.a; *see also State v. Johnson*, 411 N.W.2d 267, 270 (Minn. App. 1987) ("guideline comment II.B.501 refers to out-of-state convictions, not charges or statements by complainants or charges that may have been brought"). Cookson pleaded guilty to reckless endangerment in violation of N.D. Cent. Code § 12.1-17-03, but the state did not present any information regarding what facts Cookson admitted at the time of his guilty plea. Without this information, we cannot determine whether Cookson admitted conduct that would equate to an assault with a dangerous weapon or conduct that would equate to reckless driving in Minnesota. *Compare* Minn. Stat. § 169.13, subd. 1(a) (2016) *with* Minn. Stat. § 609.222 (2016). The factual basis for Cookson's North Dakota plea could have supported either Minnesota offense. Therefore, the state failed to establish

[3] Cookson does not challenge that the sentence he received would constitute a felony-level sentence in Minnesota.

[4] Cookson also contends that we must reverse because the state did not present certified copies of his North Dakota conviction. We have previously held, however, that the state need not provide a certified copy of the conviction. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983); *Maley*, 714 N.W.2d at 712 (permitting district courts to rely on uncertified out-of-state convictions in computing a defendant's criminal-history score). Thus, the district court did not err in relying on uncertified records.

that the North Dakota offense would constitute a felony in Minnesota, and the district court abused its discretion when it used a criminal-history score of five points to determine Cookson's sentence. Because Cookson objected to the use of his out-of-state conviction and the state failed to meet its burden of proof, we reverse the district court's decision and remand for resentencing based on four criminal history points.

Affirmed in part, reversed in part, and remanded.