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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1101**

State of Minnesota,
Respondent,

vs.

Natausha Rae Smith,
Appellant.

**Filed June 22, 2020
Affirmed
Hooten, Judge**

St. Louis County District Court
File No. 69DU-CR-18-706

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from the judgment of conviction for attempted first- and second-degree murder, third-degree assault, and kidnapping, appellant argues that: (1) the convictions for attempted first- and second-degree murder must be reversed because the

district court failed to obtain a renewed jury trial waiver after the state amended its complaint to include these charges in the complaint, and (2) the case must be remanded for resentencing because the district court improperly allocated two criminal-history points to a foreign conviction. We affirm.

FACTS

In March 2018, appellant Natausha Smith was charged with first-degree assault and kidnapping following an attack on her roommate. A few days later, the state amended its complaint the first time to include charges for aiding and abetting attempted first-degree murder—premeditated (Count I), aiding and abetting first-degree assault (Count II), and aiding and abetting kidnapping (Count III). The state amended the complaint again in June 2018 to modify Count II from aiding and abetting first-degree assault to aiding and abetting third-degree assault.

In October 2018, Smith appeared before the district court for a pre-trial hearing and waived her right to a jury trial. Two weeks after this waiver, the state sought to amend the complaint for a third time. The state moved the district court to allow an amendment of Count I from attempted first-degree murder-premeditated to aiding and abetting attempted first-degree murder while committing a kidnapping, which removed the premeditation element, and requested an additional count, aiding and abetting attempted second-degree murder (Count IV).

Smith opposed the state's third amended complaint, arguing that removing the premeditation requirement from the first-degree murder charge would alter her defense strategy. The district court, however, granted the motion. But in consideration of the

diminished legal standard caused by the removal of the premeditation element, the district court granted Smith a continuance and scheduled trial for January 2019. Smith did not renew her jury trial waiver after the state amended the complaint for the third time.

The district court found Smith guilty on all four counts following a three-day trial. During the sentencing phase, law enforcement discovered that Smith had a 2009 federal conviction for conspiracy to distribute and sell cocaine and had been sentenced to 15 months with three years of supervised release. Because of this conviction, Smith's sentencing worksheet included two criminal-history points for the offense, resulting in a total criminal-history score of two. The district court adopted the sentencing recommendations and sentenced Smith concurrently to 210 months for aiding and abetting attempted first-degree murder; 18 months for third-degree assault; and 122 months for kidnapping. The district court did not impose a sentence on the second-degree murder conviction. Smith appeals.

D E C I S I O N

I. The district court erred by failing to obtain a renewed jury trial waiver following the state's third amended complaint, but the error did not affect Smith's substantial rights.

Smith challenges her attempted first- and second-degree murder convictions, arguing that the district court erred by failing to renew her jury trial waiver following the state's third amended complaint. She argues that the district court's failure to obtain a renewed waiver was a structural error. Whether a defendant has been denied the constitutional right to a jury trial is a question of law that this court reviews de novo. *State v. Kuhlmann*, 806 N.W.2d 844, 848–49 (Minn. 2011).

Under both the United States and Minnesota Constitutions, a defendant is entitled to a jury trial. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; Minn. Const. art. I, §§ 4, 6. A defendant may waive his or her right to a jury trial, provided that such waiver is: (1) personal, (2) written or on the record in open court, (3) the district court advised the defendant “of the right to trial by jury,” and (4) the defendant had an opportunity to consult with counsel. Minn. R. Crim. P. 26.01, subd. 1(2)(a). A jury trial waiver must be knowing, intelligent, and voluntary. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970); *State v. Little*, 851 N.W.2d 878, 882 (Minn. 2014). “[A] jury-trial waiver only applies to issues formed at the time of the waiver and not to issues added after the waiver.” *Little*, 851 N.W.2d at 882. Therefore, “when the State amends the complaint after a defendant’s jury trial waiver, the district court must obtain a renewed waiver of the defendant’s right to a jury trial on the newly added charge.” *Id.* at 883.

The state charged Smith in March 2018 and then amended the complaint twice before Smith waived her right to a jury trial in October 2018. The state amended its complaint a third time in October 2018 following Smith’s waiver. The district court did not ask—and Smith did not indicate—whether she wished to renew her jury trial waiver with respect to the charges listed in the third amended complaint. Therefore, the district court’s failure to obtain Smith’s renewed jury trial waiver after the state amended its complaint constitutes error. *See id.* at 882–83 (holding that a district court must obtain a renewed waiver of a defendant’s right to a jury trial for newly added charges when a state amends its complaint).

Having determined that the district court erred, we next determine what standard of review to apply in reviewing the error. Smith contends that the denial of her right to a jury trial constitutes a structural error requiring automatic reversal, while the state argues that the decision should be reviewed for plain error.

A. The district court's error was not structural.

Only a small class of constitutional errors are reviewed for structural error. *Kuhlmann*, 806 N.W.2d at 851; *see also Arizona v. Fulminate*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263 (1991) (explaining that most constitutional errors are reviewed for harmless error). A structural error undermines the “structural integrity of the criminal tribunal itself” and therefore “is not amenable to harmless-error review.” *Vasquez v. Hillery*, 474 U.S. 254, 263–64, 106 S. Ct. 617, 623 (1986) (discussing whether discrimination in the grand jury amounts to a structural error). Structural errors involve errors that affect the entire “framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833 (1999). These errors “deprive defendants of ‘basic protections’ without which a ‘criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.’” *Id.*, 527 U.S. at 8–9, 119 S. Ct. at 1833.

When a structural error exists, the conviction must be automatically reversed. *Id.*, 527 U.S. at 8, 119 S. Ct. at 1833. Trial errors, on the other hand, include errors “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine

whether its admission was harmless beyond a reasonable doubt.” *Kuhlmann*, 806 N.W.2d at 851.

Our review of Minnesota caselaw indicates that our courts have addressed which standard of review applies when a district court fails to obtain a renewed jury trial waiver after the state amends its complaint.

First, in *Kuhlmann*, the defendant was charged with two counts of domestic assault and one count of test refusal, “both of which required the State to prove that Kuhlmann had certain qualifying previous convictions” in order to convict him. *Id.* at 847. At trial, Kuhlmann agreed to stipulate that he had the required previous convictions and the jury was not asked to find that the state had met its burden in proving that he had the qualifying convictions. *Id.* Following his conviction, Kuhlmann appealed and argued that the district court’s failure to obtain his personal waiver of the right to a jury trial on the previous-conviction elements amounted to a structural error. *Id.*

The supreme court determined that although the district court erred by failing to obtain Kuhlmann’s personal waiver, the error was not structural because “Kuhlmann received a jury trial on all of the elements of the charged offenses except for the previous-conviction elements” and “even if the trial court had obtained Kuhlmann’s personal waiver, the trial would have proceeded in exactly the same manner as it did.” *Id.* at 852. The supreme court further indicated that the district court’s error amounted to a procedural error because “[t]he jury would have been presented with the same arguments and evidence” had the district court obtained Kuhlmann’s personal waiver, and its failure to do so did not affect the outcome of the case. *Id.* The supreme court then analyzed the error under the

plain error standard of review and determined that the error did not affect Kuhlmann's substantial rights. *Id.* at 852–53.

Similarly, in *Little*, the supreme court was presented with the issue of whether a district court must renew a defendant's waiver of his right to a jury trial following an amendment to the complaint and declined to adopt a per se rule regarding the appropriate standard of review. 851 N.W.2d at 884. In *Little*, the defendant was charged with two counts of criminal sexual conduct and waived his right to a jury trial. *Id.* at 880. Following his waiver, the state amended the complaint and added an additional and more serious charge of first-degree criminal sexual conduct. *Id.* at 881. Little never personally waived his right to a jury trial following the state's amendment, and he was convicted by the district court and sentenced to 153 months in prison. *Id.*

Little appealed and the supreme court determined that a district court errs when it fails to obtain a personal waiver of a defendant's right to a jury trial after the state amends the complaint. *Id.* at 882. However, the supreme court declined to address the parties' dispute regarding the appropriate standard of review for this type of error but nonetheless determined that Little was entitled to a new trial under a plain error analysis. *Id.* at 884. Relying on the record, the supreme court indicated that there was reason to believe that Little had no knowledge that the state amended its complaint with an additional, more serious, charge of first-degree criminal sexual conduct. *Id.* at 885. The supreme court pointed to statements made by Little himself during the sentencing phase where he stated that he "did not know about the added charge until after he was found guilty." *Id.* Further, testimony from Little's defense counsel also suggested that "Little may not have had a full

appreciation of what was happening in the days leading up to [his] trial because” his trial began two days after the state amended its complaint. *Id.* Based on these facts, the supreme court reasoned that it was unlikely that Little and his counsel had fully discussed the advantages and disadvantages of waiving a jury trial following the state’s amendment and concluded that there was a reasonable likelihood that the district court’s failure to obtain a renewed jury trial waiver had a significant effect on Little’s substantial rights. *Id.* at 884.

Returning to this case, we conclude that, based on the supreme court’s reasoning in *Kuhlmann* and *Little*, the district court’s failure to obtain a renewed jury trial waiver from Smith following the state’s third amendment of the complaint does not amount to structural error. The record before us shows that, unlike the defendant in *Little*, Smith had ample time and opportunity to raise the jury trial waiver issue with the district court before proceeding with a bench trial. The state amended its complaint for the third time in October 2018, and Smith argued against the amendment but did not raise the jury trial waiver issue when the district court granted the state’s motion. The district court’s continuance following the amendment gave Smith over three months to prepare for trial. Despite the additional time that Smith had to consider the advantages and disadvantages of a jury trial, she never stated—and does not assert on appeal—that she changed her mind with respect to her desire to have a bench trial. Further, she does not suggest that she would have presented different arguments at her trial or that the trial would have proceeded in a different manner. *See Kuhlmann*, 806 N.W.2d at 852 (noting that even if a waiver was obtained the trial would have proceeded in the same way).

Based on this, the district court's failure to obtain Smith's renewed jury trial waiver after the complaint was amended for a third time was therefore not a structural error because it did not affect the framework within which the trial proceeded. *See id.* (noting that a structural error occurs when the error affects the trial's framework). Rather, the failure to secure a second waiver was simply an error in the district court's procedure when it accepted the state's third amendment to the complaint. *See Neder*, 527 U.S. at 8, 119 S. Ct. at 1833 (stating that cases involving structural error "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process'").

Smith agrees with the state that *Kuhlmann* is instructive in this case, but argues that the fact that the defendant in *Kuhlmann* received a jury trial on all but the qualifying previous-conviction elements provides a notable distinction. She maintains that in *Kuhlmann*, the supreme court determined that the failure of the district court to obtain a jury trial waiver on the previous-conviction elements did not amount to structural error because Kuhlmann did receive a jury trial on all other elements of the crime with which he was charged and had the district court obtained his jury trial waiver on the previous-conviction elements, "the trial would have proceeded in exactly the same manner as it did." *Kuhlmann*, 806 N.W.2d at 852. In this case, however, Smith argues that she never received a jury trial and the state cannot show that her jury trial would have preceded in the same manner as her bench-trial.

Although we agree that this distinction is important, we emphasize that the supreme court's analysis in *Kuhlmann* relied heavily on the defect of which *Kuhlmann* complained

of, rather than whether a jury trial occurred. Specifically, the supreme court reasoned that the district court's failure to obtain a jury trial waiver on the previous-conviction elements was not "a defect in the constitution of the trial" because Kuhlmann had not ever argued "that he did not want to stipulate to the previous-conviction elements . . . or that he wanted the jury to determine the previous-conviction elements of the offenses." *Id.* Similarly, Smith has neither pointed to anything in the record, nor argued in her brief, that she wanted a jury to determine whether the state proved the first- and second-degree murder charges. She also does not explain why, following the continuance, she never raised the jury trial waiver issue with the district court despite months elapsing between the state amending the charges and her trial. These facts lead us to conclude that the failure of the district court to renew the jury trial waiver was procedural in nature and not "a defect in the constitution of the" proceedings. *Id.*

B. The district court's error is not subject to a harmless error review.

Smith next argues that if we determine that the district court's error was not structural, then we should apply a harmless error standard of review to the district court's failure to obtain a renewed jury trial.

"Not every judicial error automatically requires reversal." *State v. Shoen*, 598 N.W.2d 370, 375 (Minn. 1999). "Most constitutional errors are reviewed for harmless error." *Kuhlmann*, 806 N.W.2d at 850. The errors for which harmless error does not apply are "the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578–79, 106 S. Ct. 3101, 3106 (1986). "[I]f the defendant had counsel and was tried by an impartial adjudicator,

there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.” *Id.* 478 U.S. at 579, 106 S. Ct. at 3106.

But we will not review a district court’s error under a harmless error standard of review if the error was unobjected to at trial. *See Kuhlmann*, 806 N.W.2d at 852; *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that “appellate courts generally will not decide issues which were not raised before the district court”). Unobjected-to errors that affect a criminal defendant’s substantial rights will be reviewed for plain error. *Kuhlmann*, 806 N.W.2d at 852. Smith never objected to the district court’s failure to obtain a renewed waiver of her right to a jury trial. Therefore, we conclude that the district court’s error here should be reviewed for plain error.

C. The plain error standard is not met because Smith has failed to show that the error affected her substantial rights.

Smith next argues that the district court’s failure to obtain a renewed jury trial waiver amounted to plain error. The state argues that the error did not affect Smith’s substantial rights.

Under the plain error standard, we must determine whether there was: (1) “an error,” (2) “that was plain,” and (3) “that affected the defendant’s substantial rights.” *Id.* Even “if each of these prongs is met, we will address the error only if it seriously affects the fairness and integrity of the judicial proceedings.” *Id.* at 852–53.

Having already concluded that an error occurred, we must determine whether the error was plain and whether the error affected Smith’s substantial rights. “An error is plain if it is clear and obvious at the time of appeal,” meaning that the error “contravenes case

law, a rule, or a standard of conduct.” *Little*, 851 N.W. 2d at 884 (quotation omitted). It is well established that “when the State amends the complaint after a defendant’s jury trial waiver, the district court must obtain a renewed waiver of the defendant’s right to a jury trial on the newly added charge. *Little*, 851 N.W.2d at 883. Because the district court’s failure to obtain a waiver of Smith’s right to a jury trial was clear and obvious, we conclude that the error was plain.

We now turn to the third-prong of the plain-error analysis: whether the error affected Smith’s substantial rights. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). “An error affects substantial rights if the error was prejudicial and affected the outcome of the case.” *Little*, 851 N.W.2d at 884. Furthermore, “[a]n error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the proceeding.” *Id.*

Smith argues that the district court’s error affected her substantial rights because the state’s third amended complaint removed the premeditation element from the aiding and abetting attempting murder charge, thereby reducing the state’s evidentiary burden. Smith maintains that “there is a reasonable likelihood that [she] would not have waived her right to a jury trial to the amended charges.” The state contends that the unique circumstances of Smith’s case make it clear that had the district court obtained a new jury trial waiver, the outcome of the case would not have been different.

We find the supreme court’s plain-error analysis in *Little* instructive. As noted earlier, in *Little*, the supreme court determined that the district court’s failure to obtain a renewed jury trial waiver affected the defendant’s substantial rights because the state’s amended charges “significantly increased the range of potential punishment” and there was

evidence in the record to suggest that the defendant may have not known about the state's amended charges prior to his trial and conviction. 851 N.W.2d at 885. For these reasons, the supreme court reversed the defendant's conviction for the most serious charge of first-degree criminal sexual conduct and remanded the case. *Id.* at 886.

Based on the supreme court's analysis in *Little*, we conclude that Smith's circumstances are quite different from Little's and do not require the same relief. The record before us indicates that Smith was aware of her right to a jury trial and to be present at the pre-trial hearing in which the state sought to amend the charges. During this hearing, the district court gave Smith the opportunity to speak to her attorney about the state's request to amend the charges for a third time and whether a continuance would be beneficial in consideration of the removal of the premeditation element for the first-degree murder charge. After deliberating for about 20 minutes, Smith requested, and the district court granted, an almost three-month continuance. Smith has pointed to nothing in the record that refutes the presumption that, following the state's third amendment of the charges, she and her counsel discussed her constitutional right to a jury trial and decided to opt for a bench trial. *See State v. Fields*, 157 N.W.2d 61, 63 (Minn. 1968) (“[I]n the absence of contrary evidence, there is a presumption that appointed counsel consulted with defendant and advised him of his rights.”).

Further, unlike the charges in *Little*, the state's third amended complaint did not include a “much more serious offense.” 851 N.W.2d at 886. Rather, the charges from the third amended complaint carried the same severity level and potential penalty as the charges from the second amended complaint. *See* Minn. Stat. § 609.17, subd. 4 (2018)

(indicating that the charge of aiding and abetting carries a designated punishment). Given the same severity of the crime and the amount of time Smith and her counsel had to consider the relatively minor changes in the third amended complaint, and that Smith never expressed a desire to forgo a bench trial in favor of a jury trial, we conclude that the district court's error did not prejudice Smith.

Because Smith has not established that the district court's failure to obtain a renewed jury trial waiver affected her substantial rights, she has not demonstrated that the district court committed plain error. We therefore affirm her conviction.

II. The district court did not err by assigning Smith two criminal-history points for her federal conviction of conspiracy to distribute.

Smith also argues that the district court incorrectly calculated her criminal-history score by assigning her two points in connection with a prior federal drug conspiracy charge. “[A] sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected on direct appeal, regardless of whether the defendant objected to the score at sentencing.” *State v. Strobel*, 921 N.W.2d 563, 573 n.1 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019). This court reviews “determinations of a defendant’s criminal-history score for abuse of discretion.” *Id.* at 573. We review the interpretation of sentencing guidelines de novo. *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005).

“A defendant’s criminal history score is calculated, in part, by allotting ‘points’ for each of a defendant’s prior convictions for which a felony sentence was imposed.” *Strobel*, 921 N.W.2d at 574; *see also* Minn. Sent. Guidelines cmt. 2.B.101 (2018) (noting that, when computing a defendant’s criminal-history score, “the offender is assigned a particular

weight for every felony conviction for which a felony sentence was stayed or imposed”). A prior foreign conviction “may be counted as a felony [for the purpose of sentencing] only if [the conviction] would *both* be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018); *see also* Minn. Stat. § 609.02, subd. 2 (2018) (defining felony as a crime that imposes “a sentence of imprisonment for more than one year”).

To determine whether a prior foreign conviction may be considered for the purpose of a criminal-history score, “the sentencing court should compare the definition of the foreign offense with the definitions of comparable Minnesota offenses but also may consider the nature of the foreign offense and the sentence received by the offender for the offense.” *Hill v. State*, 483 N.W.2d 57, 58 (Minn. 1992). In the context of a foreign prior controlled substance conviction, “the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense.” Minn. Sent. Guidelines cmt. 2.B.503 (2018).

The proper weight given to a foreign conviction “must be based on the severity level of the equivalent Minnesota felony offense.” Minn. Sent. Guidelines § 2.B.5.c (2018). The state bears the burden to “show that a prior conviction qualifies for inclusion within the criminal-history score.” *Williams*, 910 N.W.2d at 740.

We begin by observing that Smith was convicted in 2009 of knowingly and intentionally conspiring to distribute and possess with intent to distribute 500 grams or more of cocaine base (“crack”) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(a) (2006) and 21 U.S.C. § 846 (2006). Smith received a 15-month sentence followed by three years of

supervised release for the offense. Because Smith received a sentence of “more than one year,” her sentence qualifies as a “felony-level sentence” in Minnesota. *Williams*, 910 N.W.2d at 740; Minn. Stat. § 609.02, subd. 2.

Turning to whether Smith’s conviction is defined as a felony in Minnesota, we begin by comparing the language of Smith’s federal offense with Minnesota’s controlled substances statutes. We observe that the federal statutes of which Smith was convicted prohibit any person from knowingly or intentionally manufacturing, distributing, or possessing with intent to manufacture or distribute 280 grams or more of a controlled substance, including cocaine, and for conspiring to commit these offenses. 21 U.S.C. §§ 841(a)(1), (b)(1)(A); 21 U.S.C. § 846. Our review of Minnesota statutes indicates that the equivalent Minnesota offenses for the crime of which Smith was convicted of are Minn. Stat. § 152.021, subd. 1(1) (2016), which criminalizes a defendant’s sale of 17 grams or more of a controlled substance as a first-degree controlled substance crime, and Minn. Stat. § 152.096, subd. 1 (2016), which criminalizes conspiracy to commit a first-degree controlled substance crime as a felony. The term “sell” includes “to offer or agree to sell, give away, barter, deliver, exchange, *distribute*, or dispose of to another.” Minn. Stat. § 152.01, subd. 15a (2016) (emphasis added).

Based on our review of these statutes, we conclude that Minn. Stat. § 152.021 and Minn. Stat. § 152.096 are the equivalent offenses of Smith’s foreign convictions. Both the federal and Minnesota statutes indicate that they prohibit the same general activity; namely, the distribution and the intent to distribute a controlled substance, as well as prohibiting the distribution of the same type and amount of a controlled substance. *Compare* Minn.

Stat. § 152.021, subd. 1(1) (indicating that a person commits a controlled substance crime in the first degree if he or she sells 17 grams or more of a substance containing cocaine, where the term “sell” includes distribution), *with* 21 U.S.C. §§ 841(a)(1), (b)(1)(a)(ii) (indicating that the statute prohibits distribution of 280 or more grams of a mixture of cocaine). We also note that both the Minnesota and federal statutes prohibit conspiring to distribute a controlled substance. *See* Minn. Stat. § 152.096, subd. 1 (prohibiting conspiracy to distribute a controlled substance); *see also* 21 U.S.C. § 846 (prohibiting conspiracy to distribute a controlled substance). And both statutes impose a felony-level sentence of more than one year. *See* Minn. Stat. § 152.021, subd. 3(a) (2016) (explaining that an individual convicted of a first-degree controlled substance crime “may be sentenced to imprisonment for not more than 30 years”); *see also* 21 U.S.C. § 841(b)(1)(A) (explaining that an individual convicted under 21 U.S.C. § 841(a)(1) “shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life”). Based on these similarities, we conclude that Minn. Stat. § 152.021 and Minn. Stat. § 152.096 are the equivalent offenses of Smith’s foreign conviction and her foreign conviction may be considered a felony in Minnesota.

Because Smith’s offense “would both be defined as a felony in Minnesota, and [she] received a sentence in Minnesota would be a felony-level sentence,” we conclude that the district court did not abuse its discretion by considering Smith’s federal conviction as a felony for the purpose of a criminal-history score. *Williams*, 910 N.W.2d at 740.

Having determined that Smith’s conviction may be considered a felony for the purpose of determining her criminal-history score, we now turn to whether the district court

abused its discretion when it assigned two points for her felony offense. The Minnesota Sentencing Guidelines require us to look at “the severity level of the equivalent Minnesota felony offense.” Minn. Sent. Guidelines 2.B.5.c. The severity level of a first-degree controlled substance crime is D8. *Id.* at 4.C. An offense with a severity level of D8 is assigned two criminal-history points. *Id.* at 2.B.1.a. The district court assigned two criminal-history points to Smith’s federal conviction. For the foregoing reasons, we conclude that the district court properly calculated Smith’s criminal-history score.

We reject Smith’s argument that she should have received only one point in her criminal-history score because her recommended sentence as determined by the federal sentencing guidelines was 37 to 46 months, which, in the Minnesota Sentencing Guidelines, is the presumptive sentence for offenses with a severity level of D6 or D7. Smith’s application of the sentencing guidelines is incorrect. The sentencing guidelines do not instruct that severity levels for out-of-state convictions be determined based upon the sentence that was recommended or imposed for an out-of-state conviction. Rather, the guidelines instruct that a prior felony conviction from another jurisdiction “be based on the severity level of the equivalent Minnesota felony offense.” *Id.* at 2.B.5.c. We have concluded that the equivalent Minnesota felony offense in this case is a first-degree controlled substance crime, which is ranked at a severity level of D8. Minn. Sent. Guidelines 4.C. Drug offenses with a severity level of D7 or D6 are for second- and third-degree controlled substance crimes, which are not equivalent to the offense of which Smith was convicted of. *See id.* at 4.C; *see also* Minn. Stat. §§ 152.022, .023 (2016) (defining second- and third-degree controlled substance crimes). Accordingly, the district court did

not abuse its discretion when it followed the guidelines and assigned two points to Smith's 2009 federal felony conviction.

Affirmed.