STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1244

State of Minnesota,
Respondent,

vs.

Ryan Thomas Shocinski,
Appellant.

Filed July 6, 2020
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Scott County District Court
File No. 70-CR-17-22367

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge, and Reyes, Judge.

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

REYES, Judge

Appellant challenges his convictions of criminal sexual conduct on direct appeal, arguing that the district court (1) improperly accepted his waiver of his right to a jury trial

without providing a jury-unanimity advisory; (2) abused its discretion by assigning criminal-history points for convictions that had decayed based on the application of the amelioration doctrine; and (3) erroneously entered convictions on three counts of criminal sexual conduct based on the same act. We affirm in part, reverse in part, and remand.

FACTS

In December 2017, respondent State of Minnesota charged appellant Ryan Thomas Shocinski with first-degree criminal sexual conduct for penetrating a victim age 13 to 15 while in a position of authority in violation of Minn. Stat. § 609.342, subd. 1(b) (2016) (count I); first-degree criminal sexual conduct for penetrating a victim under 16 while in a significant relationship in violation of Minn. Stat. § 609.342, subd. 1(g) (2016) (count II); and second-degree criminal sexual conduct while in a position of authority in violation of Minn. Stat. § 609.343, subd. 1(b) (2016) (count III). The charges are based on an incident in which appellant digitally penetrated a 15-year-old girl who had been a family friend and who had lived with appellant, his wife, and his two children.

Appellant waived his right to a jury trial. Following a court trial, the district court found appellant guilty of all counts. Appellant moved for a judgment of acquittal or, alternatively, for a new trial. The district court denied his motions. Appellant's presentence investigation report (PSI) recommended a sentence of 168 months based on a criminal-history score of two. The PSI stated that appellant had 0.5 criminal-history points for a July 2001 conviction of financial-transaction card fraud, 0.5 points for a December 2001 conviction of receiving stolen property, and 1 point for a June 2002 conviction of introducing contraband into a correctional facility. The sentence for each of these

convictions expired in 2006. In May 2019, the district court convicted appellant of all three counts and sentenced him on count I to 168 months' imprisonment. This appeal follows.

D E C I S I O N

Appellant argues that (1) he did not provide a valid jury waiver because the district court did not inform him of the unanimity requirement; (2) the amelioration doctrine applies to changes to the sentencing guidelines that reduce his criminal-history score; and (3) the district court improperly convicted him of three offenses that arise from the same act. We address each argument in turn.

I. Appellant provided a valid waiver of his right to a jury trial.

Appellant argues that he did not provide a valid jury-trial waiver because no one advised him on the record that all 12 jurors would need to agree unanimously that the state proved him guilty. Appellant's argument lacks merit.

The U.S. and Minnesota Constitutions provide for the right to a trial by jury. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; Minn. Const. art. 1, §§ 4, 6. A defendant must waive this right knowingly, intelligently, and voluntarily. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). A valid waiver occurs if, with approval of the court, "the defendant [provides it] personally, in writing or on the record in open court, after being advised by the [district] court of the right to trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a). We strictly construe Rule 26.01, but we have noted that "the rule is easy to apply" and "mandates only a relatively painless and simple procedure." *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review*

denied (Minn. June 18, 2002). We review de novo whether a defendant provides a valid waiver of the right to a jury trial. *Id.*

A defendant's jury waiver may satisfy procedural and constitutional requirements even if the district court does not inform the defendant that the jury's decision must be unanimous. *See Ross*, 472 N.W.2d at 653-54. The supreme court in *Ross* concluded that the district court advised the defendant "of the essential characteristics of a jury trial" and that, "[w]hile [appellant] was not told that the jury's decision had to be unanimous, we do not find that omission to be critical here." *Id.* at 654. It noted that the defendant had some familiarity "with the judicial system" and that he "had ample opportunity to consult with his attorneys who presumably also told him about the pros and cons of a jury trial." *Id.*

The facts here are similar to *Ross*. Appellant expressed his desire to waive his right to a jury trial the morning his trial began. His trial counsel stated to the district court,

> [I]n the break that we just took which was a good maybe 20 minutes or something like that I had a chance to speak with my client. He asked to speak with me about waiving a jury and having a court trial, and we had a chance to discuss that at length. I'm confident that he knows what the jury trial would look like. Meaning specifically that we would have twelve jurors, that we would be picking from a larger panel, and we would get it down to twelve. . . . And so at this time my client has indicated that he wants to, in fact, waive the jury.

The district court then examined appellant regarding his waiver:

> THE COURT: At this time have you had enough time to talk to [counsel] about all of your rights in this matter?
> DEFENDANT: Yes, Your Honor.
> . . . .
> THE COURT: Have you had enough time to discuss with [counsel] the pros and cons about exercising your right to have

> a twelve-person jury decide whether or not the [s]tate has proven their case beyond a reasonable doubt?
> DEFENDANT: I have, Your Honor.
> . . . .
> THE COURT: Are you 100 percent confident in your decision to waive your right to have a jury of twelve citizens decide whether or not the [s]tate has proven their case beyond a reasonable doubt?
> DEFENDANT: I am, Your Honor.
> . . . .
> THE COURT: The Court finds that it would be appropriate to approve [appellant]'s request. I believe he's had sufficient time to consult with [his trial counsel] and that his waiver of the right to a jury is knowing, intelligent, and voluntary.

Appellant did not object to his waiver at trial or assign error to it in his motion for a new trial.

As rule 26.01, subdivision 1(2)(a), requires, appellant personally provided his waiver on the record in open court, the district court advised him of his right to trial by jury, and he had the opportunity to consult with counsel. The district court's repeated questioning of him and explanation that a 12-person jury would decide whether the state had proved him guilty beyond a reasonable doubt indicate that appellant provided his waiver knowingly, intelligently, and voluntarily. *See Ross*, 472 N.W.2d at 653.

In addition, appellant's wavier is similar to that in *Ross*. *See id.* at 654. First, although appellant's prior convictions are from the early 2000s, his numerous prior felonies and misdemeanors indicate some familiarity with the judicial system. And at his bail hearing approximately 13 months earlier, the district court stated that "[t]he [s]tate always has the burden to prove guilt beyond a reasonable doubt to a unanimous jury." Appellant stated that he understood those rights and had no questions about them. This exchange is

not part of his jury-waiver colloquy, but it shows his familiarity with the judicial system before his waiver. Second, appellant and his counsel talked "at length," about waiving his jury trial and about "what a jury trial would look like." This provided "ample opportunity" for consultation with counsel, as in *Ross*. *See id*.

In support of his argument that his waiver is invalid, appellant cites to *State v. Hamm*, 423 N.W.2d 379, 380-81 (Minn. 1988), *superseded on other grounds by* Minn. Const. art. I, § 4. In *Hamm*, the supreme court described the "essential elements" of a criminal jury trial as being that the jury is comprised of 12 members, that jurors are impartial, and that jurors must unanimously agree that the defendant is guilty. 423 N.W.2d at 381. But the supreme court decided *Ross* three years after *Hamm* and concluded that the omission of the unanimity requirement did not invalidate the defendant's jury waiver. Moreover, *Hamm* addressed the sole question of whether the Minnesota Constitution required a 12-member jury in misdemeanor and gross-misdemeanor cases, see 423 N.W.2d at 380, not what constitutes a sufficient waiver of the right to a jury trial, as the supreme court did in *Ross*, 472 N.W.2d at 653-54.

Appellant further argues that *Ross* does not apply because of a 2017 amendment to Minn. R. Crim. P. Form 32A that added language about uniformity to the written jury-waiver form. But *Ross* did not interpret this form. *Ross* interpreted Minn. R. Crim. P. 26.01, subd. 1(2)(a), and the right to a jury trial under the United States and Minnesota Constitutions. *See id.* at 653. The pertinent language of rule 26.01, subdivision 1(2)(a), has not changed since *Ross*, except for the pronoun "his." *See id.* *Ross* therefore remains applicable.

Because we conclude that the district court did not err in accepting appellant's waiver, we need not address whether the structural-error or plain-error standard of review applies to unobjected-to error. *See State v. Kuhlmann*, 806 N.W.2d 844, 850, 852 (Minn. 2011) (analyzing first whether district court erred, then reaching question of whether structural-error or plain-error standard, both of which require "error," applied); *see also State v. Little*, 851 N.W.2d 878, 883-84, 884 n.2 (Minn. 2014) (declining to resolve parties' dispute of whether structural-error or plain-error standard of review applies to unobjected-to error in jury waiver).

II. The district court abused its discretion by assigning criminal-history points for convictions to which the amelioration doctrine applies.

Appellant argues that the district court abused its discretion by assigning criminal-history points for three prior convictions because a shortened felony-decay period in Minn. Sent. Guidelines 2.B.1.c (2019) took effect before his judgment became final, and the amelioration doctrine therefore applies. The state does not oppose resentencing on this basis. However, we have an obligation to "decide cases in accordance with [the] law" even when the parties agree on an issue. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

We review the 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). But we review its interpretation of the sentencing guidelines de novo. *State v. Campbell*, 814 N.W.2d 1, 3 (Minn. 2012). The state has the

burden of establishing a defendant's criminal-history score by a preponderance of the evidence. *State v. Griffin*, 336 N.W.2d 519, 520 (Minn. 1983).

The amelioration doctrine creates a presumption that a statutory change "mitigating punishment applies to non-final cases." *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). It applies to acts committed before the effective date of the statutory change if "(1) there is no statement by the [l]egislature that clearly establishes the [l]egislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect." *Id.*

First, the legislature can express its intent to abrogate the amelioration doctrine by stating that an amendment applies only to crimes committed after a certain date. *Id.* at 491. We recently held that the legislature had made no statement "establishing its intent to abrogate the amelioration doctrine with regard to the [2019] modification to Minn. Sent. Guidelines 2 subd. B.2." *State v. Robinette*, __N.W.2d.__, 2020 WL 1909348, at *6 (Minn. App. Apr. 20, 2020). While *Robinette* addressed the amelioration doctrine with regard to the modified provision on custody-status points, as opposed to the felony-decay factor, see Minn. Sent. Guidelines 2.B.1.c, .2 (2019), we find no statement expressing the legislature's intent to abrogate the amelioration doctrine here either. Therefore, appellant meets this requirement.

Second, in deciding whether an amendment mitigated punishment, courts look to the specific provision affecting the defendant. *See Kirby*, 899 N.W.2d at 495. For stayed sentences, such as that here, the amendment reduces the decay period from 15 years from the expiration or discharge of the sentence to 15 years from the conviction. Minn. Sent.

Guidelines 2.B.1.c. A defendant with fewer criminal-history points is generally subject to a shorter presumptive sentence. *See* Minn. Sent. Guidelines 4.A (2019).

For appellant, the convictions for the three offenses for which he received criminal-history points under the 2017 guidelines occurred more than 15 years before his current conviction. Under the amendment, therefore, he would not receive points for these. With a criminal-history score of zero, rather than two, the presumptive sentence for appellant would be 144 rather than 168 months' imprisonment, and the top of the presumptive range would be 172 rather than 201 months' imprisonment. *See* Minn. Sent. Guidelines 4.B (2019). The amendment therefore mitigates punishment.

Third, a judgment is not final for purposes of the amelioration doctrine when a direct appeal is pending. *Luna-Pliego v. State*, 904 N.W.2d 916, 919 (Minn. App. 2017). Here, the modifications took effect August 1, 2019. Because appellant timely appealed his conviction and his case is pending before this court, he meets this requirement. *See id.*

Appellant meets all three requirements of the amelioration doctrine. We therefore remand for resentencing based on the application of the amended guidelines. *See Kirby*, 899 N.W.2d at 496; *see also State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017) (requiring resentencing of defendant sentenced based on incorrect criminal-history score).

III. The district court erroneously entered convictions on three counts that are based on the same act.

Appellant argues that the district court erred by convicting him of two counts of first-degree and one count of second-degree criminal sexual conduct for the same act. We agree.

The state agrees that the district court should correct the warrant of commitment but argues that it is a clerical error because the district court convicted appellant of only count I, and we therefore need not vacate any conviction.

A criminal defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2016). This prohibits a district court from convicting a defendant of multiple counts of criminal sexual conduct, whether in different statutory sections or subsections, based on "the same act or unitary course of conduct." *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989). We recently clarified that "[c]ounts, convictions, or sentences cannot 'merge' or 'combine,' and the district court should avoid using such unclear language during sentencing." *State v. Walker*, 913 N.W.2d 463, 469 (Minn. App. 2018). We described the steps that a district court should take in formally adjudicating a conviction. *Id.* at 467.

Here, the district court stated at sentencing, "At this time being convicted on Counts l, 2, and 3, them arising from the same course of conduct and merging," and then sentenced appellant without referring to any specific count. This language is not clear. *Id.* (describing similar language as "unclear"). We therefore look to the official judgment of conviction as "conclusive evidence of whether an offense has been formally adjudicated." *Id.* at 466-67 (quoting *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007)). Appellant's warrant of commitment reflects convictions on each of his three counts. Because the district court formally adjudicated convictions of three counts that arose from the same act, we reverse

and remand for vacatur of the adjudications on counts II and III, but not of the findings of guilt. *See id.* at 468.

Affirmed in part, reversed in part, and remanded.