STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1366

State of Minnesota,
Respondent,

vs.

Gary Michael Stillwell,
Appellant.

Filed July 13, 2020
Affirmed in part, reversed in part, and remanded
Connolly, Judge

St. Louis County District Court
File No. 69HI-CR-19-4

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

CONNOLLY, Judge

Appellant challenges his conviction for receiving stolen property, arguing that he was deprived of his right to a unanimous verdict because the district court failed to instruct the jurors, sua sponte, that they must unanimously agree on which of more than 100 items were stolen property that appellant received. He also challenges his sentence, arguing that he is entitled to resentencing to benefit from recent changes to the sentencing guidelines that would reduce his criminal-history score (CHS). Because we see no error of law in the conviction, we affirm it; because *State v. Robinette*, ___ N.W.2d ___, ___, 2020 WL 1909348, at *6 (Minn. App. Apr. 20, 2020), *pet. for review filed* (Minn. May 12, 2020), concluded that there was "no statement by the legislature establishing its intent to abrogate the amelioration doctrine with regard to the modification to Minn. Sent. Guidelines 2 subd. B.2," we reverse and remand for resentencing in accord with *Robinette*.

FACTS

In December 2018, police officers executing a search warrant at the home of appellant Gary Stillwell found a red trailer that had been spray-painted white and a number of items bearing the name of J.C. During the search, appellant said he had to go to work and left. A neighbor reported to the police that he had observed appellant make two trips to the trailer and remove items. While the officers were searching appellant's property, they learned that J.C.'s red trailer had been reported stolen and requested another search warrant. J.C. was asked to be present during the execution of that warrant to identify items he was certain were his property.

Appellant was charged with felony receiving stolen property and fifth-degree methamphetamine possession. He pleaded not guilty and requested a speedy trial. Following a jury trial, he was found guilty of receiving stolen property; the drug-possession charge was dismissed.

Appellant was sentenced to 26 months in prison with credit for 157 days, to be served concurrently with a 27-month sentence and a 21-month sentence in another case. Before final judgment was entered, an amendment to the sentencing guidelines became effective that would have lowered appellant's CHS and reduced his sentence.

Appellant argues on appeal that jurors should have been instructed that they had to be unanimous as to which of over 100 items were stolen property received by appellant and that an amendment to the sentencing guidelines should be applied to reduce his CHS and his sentence.

D E C I S I O N

1. Jury Instruction

When there is no objection to jury instructions at trial, the appellate court has discretion to consider a claim of error on appeal if there was plain error affecting substantial rights or an error of fundamental law in the jury instructions. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Unpreserved errors may not be reviewed unless (1) an error is demonstrated that is plain and that affected the complainant's substantial rights and (2) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). An unpreserved

claim of an omitted specific-unanimity jury instruction is reviewed for plain error. *Crowsbreast*, 629 N.W.2d at 438.

For appellant to be found guilty of receiving stolen property, the state must show that he received or possessed "any stolen property," that he knew or had reason to know it was stolen, and that the stolen property exceeded a particular monetary value, here $5,000. *See* Minn. Stat. §§ 609.52, subd. 3(2), .53, subd. 1 (2018). While jurors must unanimously agree that the state has proved each element of an offense, they need not agree as to how the state proved each element. *See Pendleton*, 725 N.W.2d at 731-33. Here, the jurors had to agree that appellant received or possessed some stolen property, that appellant knew or had reason to know the property had been stolen, and that the cumulative value of J.C.'s property that appellant received or possessed was more than $5,000.

Appellant argues that the state must also show that the jurors unanimously agreed on which of the 112 items found in or near appellant's house that J.C. identified as belonging to him had been received or possessed by appellant. He relies on *State v. Stempf*, 627 N.W.2d 352, 354, 358-59 (Minn. App. 2001) (involving one count of controlled-substance possession although the defendant was charged with possession of two different quantities of the substance in different places and at different times). In *Stempf*, the jury could have returned a guilty verdict without unanimously agreeing on where, when, and in what quantity the possession occurred—all elements of the crime. 627 N.W.2d at 358-59. Here, the jurors had to agree only that appellant received or possessed "any" of the pile of 112 items taken from J.C., that appellant knew or had reason to know the items in the pile were stolen, and that the value of the items in the pile was at least $5,000. Thus, *Stempf* is

distinguishable, and there is no support for appellant's view that the state had to show that jurors agreed unanimously as to the reception, possession, or value of each of the 112 items in the bulk theft.[1]

2. Sentencing

The proper calculation of a defendant's CHS is a question of law that is reviewed de novo. *See, e.g.*, *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). Appellant argues that his CHS was erroneously increased by one custody-status point because changes to the Sentencing Guidelines that became effective on August 1, 2019, before his conviction was final, would have lowered his CHS to six and removed a three-month custody-status enhancement, reducing his prison sentence from 26 months to 23 months. For this argument, he relies on the amelioration doctrine set out in *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017) (providing that, if (1) there is no statement by the legislature establishing its intent to abrogate the doctrine, (2) the amendment mitigates the punishment, and (3) final judgment was not entered as of the amendment's effective date, a law mitigating punishment applies to crimes committed before its effective date).

[1] This is not the first time *Stempf* has been erroneously relied on in support of the need for a unanimity instruction in other cases of this court. *See, e.g.*, *State v. Infante*, 796 N.W.2d 349, 357-58 (Minn. App. 2011 (an assault case noting that "the two acts in *Stempf* were elements of the crime, whereas [the appellant's] actions in this case [putting a gun to the victim's head and methodically loading a gun while looking her in the eye] were mere means for accomplishing an element [i.e., causing fear of imminent bodily harm or death]"); *State v. Dalbec*, 789 N.W.2d 508, 512-13 (Minn. App. 2010) (a domestic assault case rejecting the argument that the jurors should have been instructed that they had to agree on which of several acts over a period of time, but at the same place and with the same victim, constituted the assault), *review denied* (Minn. Dec. 22, 2010).

This court concluded that the amelioration doctrine does apply in appellant's situation (early release from probation) in *Robinette*, 2020 WL 1909348, at *6 (rejecting the state's argument that the amelioration doctrine cannot apply because there was no legislative action resulting in a change to the sentencing guidelines). Therefore, we reverse appellant's sentence and remand for calculation of his CHS in accord with *Robinette.*[2]

Affirmed in part, reversed in part, and remanded.

[2] *State v. Otto*, 899 N.W.2d 501, 503 (Minn. 2017) on which the state relies to argue that "[i]n proposing the new method for calculating custody status points for probationers who were discharged from probation early, the Sentencing Guidelines Commission expressly stated that the modification would only apply to crimes committed 'on or after August 1, 2019,'" concerns the Drug Sentencing Reform Act and says its relevant sections became "effective August 1, 2016, and appl[y] to crimes committed on or after that date." Thus, *Otto* has no application here.