STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1551

State of Minnesota,
Respondent,

vs.

Timothy Lee Biby,
Appellant.

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

Scott County District Court
File No. 70-CR-18-8338

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, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cochran, Judge.

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

COCHRAN, Judge

Appellant challenges his conviction of, and sentence for, attempted first-degree murder—premeditated, arguing that (1) the district court committed prejudicial plain error by

instructing the jury on transferred intent; (2) the district court abused its discretion by admitting *Spreigl* evidence that was not relevant or material and was unfairly prejudicial; and (3) the district court sentenced him based on an erroneous criminal-history score. We affirm appellant's conviction, but we reverse appellant's sentence and remand for resentencing.

FACTS

Respondent State of Minnesota charged appellant Timothy Biby with attempted first-degree murder—intentional with premeditation, and second-degree assault. The complaint alleged that Biby intentionally drove his vehicle into a motorcycle, injuring the motorcyclist. The complaint also alleged that by driving his vehicle into the motorcycle, Biby intended to kill the motorcyclist, whom he believed was his ex-wife's boyfriend.

Prior to trial, the state filed notice of intent to admit *Spreigl* evidence of an incident in North Dakota (North Dakota incident) in which Biby drove his pickup truck into an occupied house, entered the house uninvited, threatened to kill the people inside with a baseball bat, and smashed two computer screens with the bat. Biby's brother was with him during the incident, which was precipitated by Biby's brother's belief that one of the victims was "fooling around" with Biby's brother's wife. The state sought to admit the *Spreigl* evidence to "prove common scheme or plan, modus operandi, intent, preparation, identity, and absence of mistake or accident." Midway through Biby's trial, the district court heard from the parties regarding the state's request and admitted the *Spreigl* evidence over Biby's objection.

At trial, the state presented evidence that on April 29, 2018, at approximately 11:00 p.m., Scott County Deputies were dispatched to the scene of a hit-and-run involving

an 18-year-old motorcyclist. The motorcyclist testified that after leaving his friend's townhome on his motorcycle, he noticed a vehicle behind him. The motorcyclist did not notice anything suspicious about the vehicle, and soon thought the vehicle had "turned off" onto another road because he no longer observed the vehicle's headlights. But according to the motorcyclist, just after he got up to speed and turned on his high beams, he heard a "car revving" behind him and again noticed the headlights behind him. The motorcyclist testified that the "next thing" he knew, he was "rolling" after being hit from behind, and estimated that he landed about 50-to-100 feet from his motorcycle. The motorcyclist also testified that the driver of the other vehicle did not stop, and that as a result of the accident, he suffered a broken wrist and multiple scrapes and cuts, some of which required stitches.

Deputies found a piece of plastic lodged in the back of the motorcycle and further investigation determined that it came from a 1999 Honda Accord. Based upon vehicle identification markings on the piece of plastic, investigators were able to identify the specific vehicle, as well as the registered owner of the vehicle. Investigators then spoke with the registered owner of the vehicle, who informed the investigators that he had recently sold the vehicle to Biby.

Two deputies went to Biby's apartment in St. Paul. When they arrived, they observed Biby smoking a cigarette near a damaged Honda Accord. The damage to the front end of the Accord matched the piece of plastic that was found at the scene of the motorcycle accident. Biby told the deputies that he bought the Accord on approximately April 24, 2018, that he was the only driver of the vehicle, and that he had the only keys for the vehicle. Biby also told the deputies that he worked until 10:00 p.m. on April 29, and

then drove straight home. And when asked about the front-end damage to his vehicle, Biby claimed that it was already damaged when he purchased it. Biby denied being near the scene of the accident and had no explanation for why a piece of his Accord was found lodged in the motorcycle.

After speaking with Biby, deputies received a phone call from Biby's ex-wife. Biby's ex-wife lived in a townhome, located adjacent to the townhome of the person whom the motorcyclist had been visiting the night that the motorcyclist was hit. Biby's ex-wife informed an investigating deputy that she had just received a letter from Biby, which she believed contained an admission by Biby that he was involved in the hit-and-run. The letter, which was admitted into evidence, began as follows:

> Honey,
>
> By now I'm sure you have heard what I did. I'm sorry Honey. I just couldn't do it anymore. I'm so tired of not being O.K. I don't want to be a crazy person that harms people around him. I tried to kill your boyfriend. I was going to the casino & decided to drive by the condo. It's the first time I have ever done that. I was hoping you would be outside with [the dog]. I saw a guy leave on a bike & I lost it. I hate the way that guy conned you into a relationship. 10 days after we separated & he knew that before he ever saw you. Who does that? I can't believe he played you like that. Anyway, I hit him with my car. Turns out it was a high school kid. I hurt an innocent kid. I can't live like this.

Biby's ex-wife testified that she was the one who initiated the divorce and that Biby did not handle the separation well. She also testified that she believed Biby probably learned that her boyfriend rode a motorcycle from pictures posted on Facebook.

The district court instructed the jury on transferred intent. The jury subsequently found Biby guilty of the charged offenses. Based on a criminal-history score of one, the district court sentenced Biby to 190 months in prison for attempted first-degree murder—premeditated, but did not adjudicate Biby guilty or impose a sentence for second-degree assault. This appeal follows.

D E C I S I O N

I. The district court did not plainly err by giving a jury instruction on transferred intent.

Biby challenges the district court's decision to instruct the jury on transferred intent. Jury instructions, reviewed in their entirety, must fairly and adequately explain the law. *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). A district court has "considerable latitude" in selecting jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). A jury instruction is erroneous if it "materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Because Biby did not object to the transferred-intent jury instruction at trial, he has forfeited appellate review of the jury-instruction issue. *State v. Zinski*, 927 N.W.2d 272, 275 (Minn. 2019). "But, under the plain-error doctrine, an appellate court has the discretion to consider a forfeited issue if the defendant establishes (1) an error, (2) that was plain, and (3) that affected his substantial rights." *Id.* "If the first three prongs are satisfied, the appellate court considers whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 275 n.5 (quotation omitted).

The doctrine of transferred intent "is the principle that a defendant may be convicted if it is proved he intended to injure one person but actually harmed another." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006) (quotation omitted). "[T]he public policy goal of transferred intent is to hold the actor culpable for his intended actions." *Id.*

It is often applied in cases where a defendant premeditates and intends to kill one person but accidentally kills or harms another. *See State v. Hough*, 585 N.W.2d 393, 395 n.1 (Minn. 1998) (noting that "[t]he doctrine of transferred intent is frequently applied in cases where the accused intends to kill one person, but, because of bad aim, kills another"); *State v. Ford*, 539 N.W.2d 214, 219, 229 (Minn. 1995) (applying transferred intent doctrine when, in the course of shooting a police officer, defendant wounded a bystander); *State v. Merrill*, 450 N.W.2d 318, 323 (Minn. 1990) (holding intent to kill mother is transferable to her fetus); *State v. Sutherlin*, 396 N.W.2d 238, 239-40 (Minn. 1986) (holding defendant guilty of first-degree premeditated murder through transferred intent when defendant premeditated and intended the murder of one man but accidentally shot and killed a bystander). In such cases, the intent for first-degree premeditated murder may be "transferred" to the unintended victim.

Here, the district court instructed the jury on transferred intent as follows:

> If [Biby] acted with premeditation and with the intent to cause the death of a person other than the deceased, the elements of premeditation with intent to kill are satisfied and may be transferred to another victim, even if [Biby] did not intend to kill the other person. This concept is known as "transferred intent."

Relying on *Hall*, Biby argues that the district court plainly erred by instructing the jury on transferred intent because "there were no facts in the record to support that theory." In *Hall*, the defendant threatened a clerk at a gasoline station and then, after leaving the station, fought with unidentified men outside the station. 722 N.W.2d at 475. He told his friends that he "got jumped" by three men, and said he was going to kill them. *Id.* The defendant then left his apartment with a gun and shot the clerk (who was not involved in the earlier fight with the men in the parking lot) at point-blank range. *Id.* The supreme court held that a transferred-intent instruction was in error because there was no evidence that the defendant shot the victim intending to kill anyone except the victim. *Id.* at 478. In other words, there was no evidence that the defendant "intended to kill one person but instead accidentally killed another person." *Id.*

Biby's reliance on *Hall* is misplaced. In contrast to *Hall*, the record supports that Biby intended to kill one person but instead harmed another person. The evidence shows that Biby mistook the motorcyclist for his ex-wife's boyfriend. Thus, *Hall* is distinguishable from the circumstances presented in this case.

In *State v. Cruz-Ramirez*, the supreme court applied the doctrine of transferred intent to first and second-degree murder charges for the death of a man in a vehicle and attempted first and second-degree murder charges for three other men in close proximity to the vehicle in a gang-related shooting with a semiautomatic weapon. 771 N.W.2d 497, 500-03, 506-07 (Minn. 2009). On appeal, the defendant argued that transferred intent did not apply because there was no evidence "that any of the victims were accidental, unintended victims." *Id.* at 507. The supreme court rejected the defendant's argument, explaining that

"transferred intent allows evidence of an intent to harm someone to transfer to the person actually harmed when there is a possibility the victim was not the intended recipient of the specific act." *Id.* (quotation omitted). Noting that the defendant "shot a semiautomatic weapon multiple times toward several people in close proximity," the supreme court concluded that "[t]he evidence, while showing intent to kill and premeditation, [did] not unerringly show that each fired bullet was intended for the person that it hit." *Id.*

Here, as Biby points out, this is not a case where he pointed a gun at someone intending to kill that person, but then accidentally shot another person. Rather, the evidence suggests that he intended to kill the person on the motorcycle, and attempted to do so by hitting him with his vehicle. Consequently, the circumstances in *Cruz-Ramirez* are distinguishable from the circumstances in this case. But the record reflects that Biby intended to kill his ex-wife's boyfriend, and mistook the motorcyclist for that person, making the motorcyclist an unintended recipient of Biby's act. *See id.* (explaining that "transferred intent allows evidence of an intent to harm someone to transfer to the person actually harmed when there is a possibility the victim was not the intended recipient of the specific act" (quotation omitted)). Because the motorcyclist was an unintended recipient of Biby's act, the doctrine of transferred intent is applicable.

Moreover, the doctrine of transferred intent "applies when a defendant claims that 'bad aim' or a *mistaken identity* resulted in the crime affecting a victim other than the intended victim." *State v. Austin*, 788 N.W.2d 788, 793 (Minn. App. 2010) (emphasis added) (applying doctrine of transferred intent to a charge of criminal sexual conduct where it could be shown both that the defendant intended intimate contact with someone other

than the person with whom contact actually occurred and that the intended contact constituted an act of criminal sexual conduct) (citing 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(d), at 475-78 (2d ed. 2003)), *review denied* (Minn. Dec. 14, 2010). As the state points out, this is a case of mistaken identity. The evidence supports that Biby intended to kill the motorcyclist, but did so believing the person on the motorcycle was his ex-wife's boyfriend.

Finally, Biby was charged with attempted first-degree murder—premediated under Minn. Stat. § 609.185(a)(1) (2016). That statute provides that a person is "guilty of murder in the first degree" if he "causes the death of a human being with premeditation and with intent to effect the death of the person *or of another*." Minn. Stat. § 609.185(a)(1) (emphasis added). The language "or of another" indicates that section 609.185(a)(1) specifically contemplates transferred intent because, under the statute, an offender can be found guilty of first-degree murder if the offender, with premeditation and intent to effect the death of a person, causes the death of another person. *Id.* Because Biby, with premeditation and intent, attempted to kill the motorcyclist, but did so believing the person on the motorcycle was his ex-wife's boyfriend, we conclude that the doctrine of transferred intent is applicable. Therefore, the district court did not err by giving a jury instruction on transferred intent.

Even assuming Biby could demonstrate that the transferred-intent jury instruction was given in error, he is unable to demonstrate that the error was plain. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017)

(quotation omitted). As we discussed above, the district court's decision to provide the transferred-intent jury instruction does not contravene *Hall*, the case relied upon by Biby, because *Hall* is readily distinguishable. And Biby cites no other case, rule, or standard of conduct that contravenes the jury instruction provided in this case. In fact, as discussed above, the instruction is consistent with section 609.185(a)(1). The district court, therefore, did not plainly err by providing a jury instruction on transferred intent. And because the district court did not plainly err by instructing the jury on transferred intent, we need not address Biby's argument that the error affected his substantial rights. *See Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011) (stating that all three prongs of the plain-error test must be satisfied to merit reversal of a conviction, and if an appellate court determines that "any of the requirements are not satisfied, [it] need not address any of the others").

II. The district court did not abuse its discretion by admitting the *Spreigl* evidence.

Biby challenges the district court's admission of *Spreigl* evidence of the North Dakota incident. Evidence of other crimes or acts is commonly referred to as "*Spreigl* evidence" after our supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). "A district court's decision to admit *Spreigl* evidence is reviewed for an abuse of discretion. A defendant who claims the [district] court erred in admitting evidence bears the burden of showing an error occurred and any resulting prejudice." *State v. Griffin*, 887 N.W.2d 257, 261-62 (Minn. 2016) (citation omitted).

Spreigl evidence "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1); *State v. Smith*, 932 N.W.2d 257, 266 (Minn. 2019) (stating that "[g]enerally, other-crimes evidence is not admissible to demonstrate that the defendant (a) has a propensity to commit crimes and (b) acted in accord with that propensity"). But *Spreigl* evidence may be admitted for other limited purposes such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b)(1). In order to admit *Spreigl* evidence, the following conditions must be satisfied:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 686 (Minn. 2006).

Biby challenges the application of the fourth and fifth factors articulated in *Ness*. He argues that the North Dakota incident was not relevant or material to the state's case because "it was legally dissimilar to the current case." Biby also contends that the "potential for unfair prejudice to [him was] substantially outweighed by the zero probative value the evidence had."

A. Relevancy

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. When determining whether *Spreigl*

evidence is relevant and material, the district court "should consider the issues in the case, the reasons and need for the evidence," and whether there is a "sufficiently close relationship" between the prior offense and the charged offense in terms of time, place, or modus operandi. *State v. Courtney*, 696 N.W.2d 73, 83 (Minn. 2005). "[T]he district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Ness*, 707 N.W.2d at 686 (quotation omitted).

In admitting the *Spreigl* evidence, the district court determined:

> One of the other means that it was being presented for was absence of mistake or accident, and that appears to be a significant issue in this trial as it's clear that the defense theory of the case is that this was merely an accident that Mr. Biby inadvertently struck a person on the road. This evidence goes a long way to show intentional conduct using a motor vehicle to effectuate some sort of intimidating conduct and that is certainly sufficiently similar to rise to the level of an admissible *Spreigl* offense or incident.

Biby argues that the district court abused its discretion by admitting evidence of the North Dakota incident because it was not sufficiently similar to the circumstances presented in this case. Specifically, he contends that his use of the pickup to smash a hole in the wall of the house in North Dakota is not sufficiently analogous to his alleged use of his vehicle as a weapon in this case. Biby argues that because the pickup "was not used as a weapon in the North Dakota case, the only similarities were superficial in nature and were non-germane to the ultimate issue in the current case." We disagree.

The North Dakota incident involved Biby ramming his pickup into an occupied house. If, as a result of this action, somebody was injured because he or she happened to be standing in the house in the path of the pickup, his use of the pickup could be considered

a weapon in that situation. Consequently, his use of the pickup is analogous to his use of the Accord in this case. Moreover, Biby's actions in the North Dakota incident were prompted by his belief that one of the occupants in the North Dakota house was cheating with his brother's wife, which is akin to Biby's underlying motive for hitting the motorcyclist with his vehicle—his belief that the motorcyclist was in a relationship with his ex-wife. Thus, the North Dakota incident was relevant and material to the state's case because Biby's actions in the North Dakota incident were markedly similar to his actions in this case. *See State v. Rainer*, 411 N.W.2d 490, 497 (Minn. 1987) (in order to show absence of mistake or accident, there must be some relationship in time, location, or modus operandi between the charged crime and the other acts).

B. Potential for Prejudice

With regard to the potential for prejudice, the relevant inquiry is whether the probative value of the *Spreigl* evidence outweighs its potential for *unfair* prejudice. *Kennedy*, 585 N.W.2d at 389. In the *Spreigl* context, unfair prejudice "does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotation omitted).

Here, as discussed above, the *Spreigl* evidence was relevant and material to the state's case in light of the similarities between the North Dakota incident and the charged offense. And Biby is unable to demonstrate that admission of the *Spreigl* evidence gave the state an unfair advantage because it was highly probative of Biby's propensity for using

a vehicle as a weapon. Moreover, the district court instructed the jury about the limited use of the *Spreigl* evidence, which lessens the probability of the jury giving undue weight to the evidence. *See Kennedy*, 585 N.W.2d at 392 (stating that the probability of undue weight being given by the jury to the *Spreigl* evidence was "lessened" by the reading of cautionary instructions by the district court). Therefore, the district court did not abuse its discretion by admitting the *Spreigl* evidence.

Finally, even if Biby were able to demonstrate that the district court abused its discretion by admitting the *Spreigl* evidence, he is entitled to relief only if he can demonstrate that "there is a reasonable probability that the wrongfully admitted evidence significantly affected the verdict." *Griffin*, 887 N.W.2d at 262. Biby cannot meet his burden because there is ample evidence in the record to support the jury's finding of guilt without the *Spreigl* evidence. The motorcyclist testified that on the night of the accident, it was dry and visibility was clear. He also testified that right before the accident, he heard an engine "revving" as if it were accelerating, and saw the vehicle's headlights behind him. Moreover, the record reflects that a piece of the Honda Accord that struck the motorcycle was found lodged in the motorcycle, and that piece was traced to an Accord that Biby acknowledged belonged to him. The record further reflects that on the night of the accident, the motorcyclist left a townhome that was adjacent to the townhome where Biby's ex-wife resided. And, in a letter that Biby sent to his ex-wife, Biby admitted driving by his ex-wife's townhome on the night of the accident and then striking a motorcyclist with his car because he believed the person on the motorcycle was his ex-wife's boyfriend. Finally, Biby's ex-wife testified that Biby likely knew that her boyfriend rode a motorcycle

from pictures posted on Facebook. The motorcyclist's testimony, in conjunction with the letter written by Biby, refuted Biby's defense that his conduct was an accident.

Based on the evidence of Biby's guilt presented at trial, there is no reasonable possibility that any error in admitting the *Spreigl* evidence significantly affected the verdict. *See State v. Smith*, 940 N.W.2d 497, 503 (Minn. 2020) (stating that the erroneous admission of *Spreigl* evidence requires reversal only "if there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict" (quotation omitted)). Accordingly, Biby is not entitled to a new trial.

III. Biby is entitled to be resentenced with a criminal-history score of zero.

Biby argues that because his criminal-history score was improperly calculated as one rather than zero, he is entitled to be resentenced with a criminal-history score of zero. The state agrees that Biby should be resentenced with a criminal history score of zero rather than one. Based on our independent review of the record, we conclude that the parties are correct.

This court will not reverse a district court's calculation of a defendant's criminal-history score absent an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). But the interpretation of the sentencing guidelines used in calculating a criminal history score is a legal question that we review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). And while Biby did not object to his criminal-history score at sentencing, his challenge to his sentence on appeal is properly before us because Biby cannot waive review of his criminal-history score. *See State v. Maurstad*,

733 N.W.2d 141, 147 (Minn. 2007) (holding that a defendant cannot waive a challenge to an incorrect criminal-history score).

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 when calculating a defendant's Minnesota criminal-history score. Minn. Sent. Guidelines 2.B.5.a & cmt. 2.B.502 (Supp. 2017). An out-of-jurisdiction conviction may be counted as a felony in calculating a criminal-history score "only if it would *both* be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b. (Supp. 2017).

In Minnesota, a felony offense is one "for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2 (2016). A crime is considered a gross misdemeanor so long as it "is not a felony or misdemeanor." *Id.*, subd. 4 (2016).

Under the sentencing guidelines, "[p]rior gross misdemeanor and misdemeanor convictions count as units comprising criminal history points. Four units equal one criminal history point; give no partial point for fewer than four units." Minn. Sent. Guidelines 2.B.3 (Supp. 2017). An offender is assigned a unit for each prior misdemeanor/gross misdemeanor offense only if the "offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing." *Id.* 2.B.3.a. But "[w]hen multiple offenses arising from a single course of conduct

involving multiple victims were sentenced," the offender is assigned "only the two most severe offenses units in criminal history." *Id.* 2.B.3.d.

Here, the record reflects that Biby was assigned one criminal-history point based on his accrual of four misdemeanor/gross misdemeanor units. Biby received one misdemeanor/gross misdemeanor unit for his 2011 conviction in North Dakota for driving while impaired (DWI), and three misdemeanor/gross misdemeanor units for his three convictions arising out of his conduct in the North Dakota incident. For his conduct in the North Dakota incident, Biby was convicted of menacing, and two counts of criminal mischief. Biby was then sentenced to one year for the menacing offense and one year for one of the criminal-mischief offenses; he was not sentenced for the second criminal-mischief offense.

Biby argues that because only one sentence was imposed for his two convictions of criminal mischief, he was incorrectly assigned one unit each for the two criminal-mischief convictions. We agree. As stated above, the record reflects that two convictions of criminal mischief were entered, but only one sentence was imposed for those offenses. Because only one sentence was imposed, Biby should have been assigned only one unit for the criminal-mischief offenses. *See* Minn. Sent. Guidelines 2.B.3.a (stating that an offender is assigned a unit for each prior misdemeanor/gross misdemeanor offense only if the "offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing"). And because Biby should have received only one unit for the two criminal-mischief offenses, he accrued only three misdemeanor/gross misdemeanor units, one unit short of the amount needed to assign a criminal-history point.

See Minn. Sent. Guidelines 2.B.3 (stating that "[p]rior gross misdemeanor and misdemeanor convictions count as units comprising criminal history points," and "[f]our units equal one criminal history point"). As the state acknowledges, "Biby should be resentenced with a criminal-history score of zero" because he was improperly assigned a criminal-history point. Accordingly, we reverse Biby's sentence and remand for resentencing.

Affirmed in part, reversed in part, and remanded.