STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1745

State of Minnesota,
Respondent,

vs.

Joshua James Dennison,
Appellant.

Filed August 31, 2020
Affirm in part, reverse in part, and remand
Cochran, Judge

Hennepin County District Court
File No. 27-CR-19-2849

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Cochran, Judge.

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

COCHRAN, Judge

Following a bench trial, appellant was convicted of first-degree burglary (assault), first-degree burglary (occupied dwelling), and domestic assault. The warrant of commitment reflects that sentences were imposed for all three convictions.

On appeal, appellant argues that his convictions must be reversed because his jury-trial waiver was invalid. Alternatively, he argues that one of his first-degree burglary convictions and the associated sentence must be vacated because Minn. Stat. § 609.04 (2018) bars multiple convictions under the same statute where the convictions arose from the same behavioral incident. Finally, he contends that his remaining sentences are unlawful. Because Dennison's jury-trial waiver was valid, we affirm in part. But because the district court erred when it convicted Dennison of two counts of first-degree burglary based on the same conduct and erred in sentencing, we reverse in part and remand.

FACTS

On January 21, 2019, appellant Joshua James Dennison broke into his ex-girlfriend's apartment while she was asleep. His ex-girlfriend (the victim) woke up and found Dennison in bed with her. The victim told Dennison to leave or she would call the police. When the victim attempted to use her phone, Dennison hit her with his clothes. The victim fled to a neighbor's apartment, and the neighbor called the police.

The state charged Dennison with one count of first-degree burglary (assault) under Minn. Stat. § 609.582, subd. 1(c) (2018), one count of first-degree burglary (occupied

dwelling) under Minn. Stat. § 609.582, subd. 1(a) (2018), and one count of felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2018).

At a pretrial omnibus hearing on March 19, 2019, Dennison appeared with a public defender. At the hearing, Dennison requested to discharge his public defender, submitted a petition to proceed pro se, and indicated that he wanted a bench trial. Dennison's public defender explained to the court that another attorney from the public defender's office had met with Dennison approximately a week before the hearing and "had a lengthy discussion with him about the pros and cons of representing [himself]." The public defender's colleague also reviewed with Dennison a petition to proceed pro se.

During the hearing, the public defender went over the petition with Dennison on the record. During the colloquy with the public defender, Dennison stated that he had been taking medication but had stopped taking it after being taken into custody. The public defender then asked Dennison if he was of a clear mind. Dennison stated that he was not sure and requested the court give him street drugs to clear his mind. After the court indicated that was not possible, the public defender proceeded with his questioning. The public defender asked Dennison if he remembered talking with his colleague about the petition to proceed pro se, and Dennison responded that he did. Dennison also recalled the public defender and his colleagues telling him that he would be better off having a lawyer.

The public defender also asked Dennison if he understood that he would be held to the same rules and standards as an attorney. Dennison confirmed that he understood and that he had "been trying to read up" on the law. The public defender informed Dennison that he could make motions and present his own evidence, and that he had a right to a

pre-trial hearing. The public defender also informed Dennison of his right to a trial by a jury or a judge, and noted that was a decision that Dennison would need to make. At the end of the questioning, the public defender asked Dennison if he was of "clear enough mind" to make the decision to waive his right to counsel and Dennison responded that he was. The district court ultimately granted Dennison's request to proceed pro se.

Before the public defender was dismissed, Dennison asked the court if a bench trial would be faster than a jury trial. The public defender told Dennison that he would advise against a bench trial. After Dennison asked why the public defender recommend he not proceed with a bench trial, the district court explained that with a bench trial, only one person determines guilt whereas with a jury trial, "twelve people who don't know you . . . get together and they go through whatever evidence is presented and they deliberate in the back room and they come up with whether or not you're guilty or not guilty." Dennison stated that he would "be more comfortable with one person judging [him] instead of these twelve people that don't know the law." The district court informed Dennison that it would instruct the jurors on the law, and suggested that a jury trial was his "best bet."

After a short recess, the district court denied Dennison's request to waive a jury trial. The district court explained that it did not believe that Dennison's jury-trial waiver was "intelligently entered into" or in his "best interest." Dennison objected to the district court's decision and asserted that he had a right to waive a jury trial. Dennison reiterated his request for a bench trial several more times before the hearing ended. But the district

court maintained its decision to deny Dennison's request to waive a jury trial. The district court set a trial date and explained the jury selection process to Dennison.

Two months later, on May 20, 2019, before the same district court judge, Dennison repeated his request for a bench trial. This time the district court agreed to allow Dennison to proceed with a bench trial. The trial started the next day. Before the trial started, the court asked Dennison if it was still his desire to waive a jury trial, and Dennison responded, "Yes." The bench trial proceeded. After the bench trial, the district court found Dennison guilty of all counts.

At sentencing, the district court imposed a sentence on only one of the first-degree burglary charges. The district court based its sentence on a criminal-history score of three. A sentencing worksheet in the record shows that Dennison's criminal-history score was calculated based on points assigned for each of Dennison's prior convictions for which a felony sentence was imposed and included a 2016 fifth-degree controlled-substance-possession conviction that carried a 0.5 criminal-history point. Dennison did not object to his criminal-history-score calculation at sentencing. Dennison requested a downward dispositional departure to a stayed sentence. The district court denied his request and instead sentenced Dennison to 78 months' imprisonment. Even though the district court only pronounced a sentence on one of the first-degree burglary counts, the warrant of commitment shows 78-month sentences for all three counts.

Dennison appeals.

D E C I S I O N

Dennison argues that (1) his jury-trial waiver was invalid, (2) the district court erred by convicting him of two counts of first-degree burglary that arose from the same behavioral incident, (3) the district court erred when it sentenced him to an upward departure on the domestic assault charge, and (4) the state failed to meet its burden of proving that the 2016 fifth-degree controlled-substance-possession conviction was properly included in his criminal-history score. We address each argument in turn.

I. Dennison's jury-trial waiver was valid.

Dennison argues that his jury-trial waiver was not knowing, intelligent, and voluntary because the district court failed to ensure that he understood "the basic elements of a jury trial" when he renewed his request for a bench trial two months after the district court denied his original request. We are not persuaded.

A criminal defendant has the constitutional right to a jury trial when charged with an offense punishable by incarceration. *State v. Kuhlman*, 806 N.W.2d 844, 848 (Minn. 2011). But a criminal defendant may waive the constitutional right to a jury trial. *Id.* Minnesota Rule of Criminal Procedure 26.01, subdivision 1(2)(a) sets forth four requirements for waiving one's right to a jury trial: (1) the waiver must be personal, (2) the waiver must be written or on the record in open court, (3) the court must advise the defendant "of the right to trial by jury," and (4) the defendant must have had an opportunity to consult with counsel. Strict compliance with rule 26.01, subdivision 1(2)(a) is required for a valid waiver. *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986).

In addition to the requirements set forth by the rule, a defendant's waiver of the right to a jury trial must be knowing, intelligent, and voluntary. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970); *see also State v. Little*, 851 N.W.2d 878, 882 (Minn. 2014) (discussing knowing and intelligent requirements). To ensure a waiver is "knowingly and voluntarily made," the district court should engage in an on-the-record colloquy focusing on "the basic elements of a jury trial." *State v. Ross*, 472 N.W.2d 651, 654 (Minn. 1991).[1] "The nature and extent of the inquiry may vary with the circumstances of a particular case." *Id.* A defendant's familiarity with the judicial system, such as through past convictions, and the extent of the defendant's opportunity to consult with his attorney can justify a less probing colloquy. *Id.* We review de novo whether a defendant has been denied his constitutional right to a jury trial. *Kuhlman*, 806 N.W.2d at 848-49.

Based on the record as a whole, we conclude that Dennison knowingly, intelligently, and voluntarily waived his right to a jury trial. At the March hearing, the district court advised Dennison of his right to a jury trial and explained the basic elements of a jury trial. The district court also explained the differences between a jury trial and a court trial. The record reflects that Dennison understood the differences between the two types of trials,

[1] In *Ross*, the supreme court noted that there is no need for the defendant to have "an exhaustive knowledge of all the doctrinal subtleties of Sixth Amendment jurisprudence" for a jury-trial waiver to be effective. 472 N.W.2d at 654 (quotation omitted). The supreme court instead referred district courts to *United States v. Delgado*, 635 F.2d 889, 890 (7th Cir. 1981). In *Delgado*, the Seventh Circuit Court of Appeals advised trial courts that they should explain to the defendant that "a jury is composed of twelve members of the community, that the defendant may participate in the selection of the jurors, and that the verdict of the jury is unanimous," and that "if [the defendant] waives a jury, the judge alone will decide guilt or innocence." 635 F.2d at 890. Our supreme court commended these "helpful guidelines" to the district courts. *Ross*, 472 N.W.2d at 654.

and understood his right to a jury trial. Moreover, after the district court denied Dennison's initial request for a bench trial, Dennison repeated his request for a bench trial multiple times before the hearing ended, noting that he had the "right to choose" between a jury trial and a bench trial. *See* Minn. R. Crim. Pro. 26.01, subd. 1(2)(a) (a defendant "may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court").

Dennison argues that because the district court denied his jury-trial-waiver request at the March hearing, the district court was required to conduct an additional, detailed colloquy when he made the request again before trial in May. We are not persuaded.

In determining whether Dennison's jury-trial waiver was valid, we look at the entire record, not solely the May waiver discussion. *See State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979) (concluding that there was sufficient evidence in the "entire record" for the district court to determine a waiver was voluntarily and intelligently waived). The record demonstrates that Dennison was familiar with the judicial system. Dennison had five prior hearings with the court over a period of several months. And Dennison had the opportunity to consult with counsel when he first attempted to waive his right to a jury trial in March. While the district court could have asked more probing questions after he again requested to waive his right to a jury trial in May, the circumstances of Dennison's case support the district court's less-probing colloquy. *See Ross*, 472 N.W.2d at 654. Therefore, a less-probing colloquy was sufficient. *Id.*

Further, Dennison cites no authority that requires the district court to conduct a new, detailed inquiry in circumstances such as these. While a waiver may be invalid if the

prosecutor later amends the complaint to add a more serious charge, that did not occur in this case. *Cf. Little*, 851 N.W.2d at 883 (holding 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"). Instead, Dennison went to trial on the original charges.

Taken as a whole, the record demonstrates that Dennison's decision to waive his right to a jury trial was knowing, intelligent, and voluntary. *See Pietraszewski*, 283 N.W.2d at 890 (finding that a one-question colloquy was sufficient where the trial court had "numerous contacts" with the defendant prior to trial). Therefore, we conclude that Dennison's waiver was constitutionally valid.

II. The district court erred by convicting Dennison of two counts of first-degree burglary that arose from the same behavioral incident.

Dennison next argues, and the state agrees, that Dennison should have been convicted of and sentenced for only one count of first-degree burglary. Dennison contends that the district court erred by entering convictions for both counts of first-degree burglary, in violation of Minn. Stat. § 609.04, because both convictions arose out of the same behavioral incident.

"Section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). However, "the protections of section 609.04 will not apply if the offenses constitute separate criminal acts." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006).

Here, Dennison was convicted of two forms of first-degree burglary—first-degree burglary (assault) under Minn. Stat. § 609.582, subd. 1(c) and first-degree burglary (occupied dwelling) under Minn. Stat. § 609.582, subd. 1(a). Both crimes arise under the same criminal statute. *See Jackson*, 363 N.W.2d at 760 n.1 (reversing so that a conviction could be vacated where defendant was convicted of two crimes that arose under different subdivisions of the same statute). Thus, the protections of section 609.04 apply unless Dennison's offenses constitute separate criminal acts. *See Bertsch*, 707 N.W.2d at 664.

The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035 (2018). *Bertsch*, 707 N.W.2d at 664. Determining whether two intentional crimes are part of a single behavioral incident requires consideration of the time and place of the crimes and whether the criminal conduct was motivated by a single criminal objective. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). The state has the burden of proving that the crimes were not part of a single behavioral incident. *State v. Zuehlke*, 320 N.W.2d 79, 82 (Minn. 1982). We "review the district court's finding of fact under a clearly erroneous standard, and its application of the law to those facts de novo." *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020).

Both of Dennison's burglary convictions were based on the same behavioral incident—Dennison entering the victim's apartment and assaulting her. And the convictions do not meet the "any other crime" exception because both convictions specify burglary as the crime committed. *See, e.g.*, *State v. Holmes*, 778 N.W.2d 336, 341 (Minn. 2010) ("The phrase 'any other crime' means a crime that requires proof of different

statutory elements than the crime of burglary." (quotation omitted)); *State v. Mitchell*, 881 N.W.2d 558, 563-65 (Minn. App. 2016), *review denied* (Minn. 2016). Because Dennison's first-degree burglary convictions fall under the same criminal statute and arose out of a single behavioral incident, the district court erred by entering convictions for both counts. Accordingly, we remand to the district court to vacate the conviction and the corresponding sentence of one of the two first-degree burglary counts. *See Mitchell*, 881 N.W.2d at 564.

III. The district court erred when it sentenced Dennison to an upward departure for domestic assault.

Dennison next argues that the 78-month sentence imposed on count three (felony domestic assault) is an impermissible upward departure and must be reversed. The state agrees. At the sentencing hearing, the district court orally imposed the presumptive guidelines sentence of 78 months' imprisonment for one of Dennison's first-degree burglary convictions, and did not impose a sentence for the additional first-degree burglary count or the felony domestic assault count. But the warrant of commitment shows a 78-month executed sentence for each of the three offenses.

A district court's unambiguous oral pronouncement of a sentence controls over a conflicting written order. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002). Here, the district court did not pronounce a sentence for the felony domestic assault count. The warrant of commitment is therefore incorrect. Accordingly, we reverse and remand for the district court to issue an amended warrant of commitment that does not indicate a sentence for this offense.

IV. The state did not prove Dennison's 2016 fifth-degree controlled-substance-crime conviction qualified as a felony in calculating his criminal-history score.

Finally, Dennison argues that the district court erred by determining that his 2016 fifth-degree controlled-substance-crime conviction qualified as a felony (rather than a gross misdemeanor) for purposes of calculating his criminal-history score. He maintains that the state failed to prove that the prior offense would have been classified as a felony under the offense definitions applicable on the date of the current offense. *See* Minn. Sent. Guidelines 2.B.7.a (2018). Thus, Dennison argues, the district court erred because his criminal history score lacked a sufficient evidentiary basis. The state argues that the record supports the district court's classification of the 2016 conviction as a felony in its calculation of Dennison's criminal-history score.

"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." *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). "The classification of a prior offense as a felony is determined by current Minnesota offense definitions (*see* Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies." Minn. Sent. Guidelines 2.B.7.a. The state bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score. *State v. Edmison*, 379 N.W.2d 85, 87, n.1 (Minn. 1985). We review a district court's criminal-history score determination for an abuse of discretion. *State v. Strobel*, 921 N.W.2d 563, 573 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019) (*Strobel I*); *see also State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018); *State v. Stillday*,

646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002) ("[W]e will not reverse the district court's determination of a defendant's criminal history score absent an abuse of discretion.").[2]

The district court imposed a sentence of 78 months for Dennison's first-degree burglary offense. The imposed sentence was the presumptive sentence based on a criminal-history score of three. *See* Minn. Sent. Guidelines 4.A. The criminal-history score of three was comprised, in part, of Dennison's 2016 conviction for fifth-degree possession of a controlled substance. Dennison was allocated 0.5 *felony* criminal-history point for this offense.[3]

At issue here is whether the 2016 conviction for fifth-degree possession of a controlled substance was improperly classified as a felony in Dennison's criminal-history score calculation, rather than a gross misdemeanor. We conclude that it was improperly classified because the state failed to produce evidence demonstrating that the 2016 offense would have been a felony at the time of Dennison's current offense committed in January 2019.

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[2] Because our precedent clearly establishes an abuse-of-discretion standard for reviewing the district court's criminal-history score calculation in a particular case, we reject Dennison's argument that we review this issue de novo. *But see State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018) (noting that interpretation of the Minnesota Sentencing Guidelines is a question of law subject to de novo review on appeal). We also recognize that Dennison did not dispute his criminal-history score calculation before the district court. Our review is still proper because Dennison cannot forfeit review of his criminal-history score. *See State v. Strobel*, 932 N.W.2d 303, 305-06 (Minn. 2019) (*Strobel II*) (noting that an appellant cannot forfeit review of a criminal-history score because a sentence based on an incorrect criminal-history score is an illegal sentence).

[3] The amount of points allotted for a particular offense depends upon the severity level of the offense. Minn. Sent. Guidelines 2.B.03.

As noted above, "[t]he classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies." Minn. Sent. Guidelines 2.B.7.a. The Minnesota Supreme Court has determined that the phrase "offense definitions," as used in this provision of the guidelines, refers to "the element-based definitions of crimes" found in statutes, and that "the classification of a prior offense [as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony] is determined by reference to the statute setting forth the elements of the crime." *Strobel II*, 932 N.W.2d at 304, 309-10.

According to the presentence investigation report, Dennison has a 2016 conviction for fifth-degree controlled substance possession for an offense that occurred in 2015. At that time, possession of any amount of a controlled substance, other than a small amount of marijuana, was a felony. *See* Minn. Stat. § 152.025, subd. 2(a)(1) (2014). But the fifth-degree controlled-substance-crime statute has since been amended, *see* 2016 Minn. Laws ch. 160, § 7, at 583-85, and at the time of the current offense (January 2019), a person possessing certain amounts of a controlled substance may be guilty of only a gross misdemeanor under specified circumstances. *See* Minn. Stat. § 152.025, subd. 4(a) (2018). Thus, without additional information, it is impossible to determine whether the 2016 conviction at issue would have been a gross misdemeanor or a felony under the statute applicable at the time of the current offense. And the state did not introduce any additional

information that would support the decision to classify the conviction at issue as a felony.[4] Consequently, the state did not meet its burden of proving that the 2016 fifth-degree controlled-substance-crime conviction should be classified as a felony for the purpose of calculating Dennison's criminal-history score. *Cf. Williams*, 910 N.W.2d at 740 (indicating that the state bears the burden of proving that a prior conviction qualifies for inclusion in a defendant's criminal-history score).

Despite the state's failure to prove that the 2016 controlled-substance-crime conviction should be classified as a felony, the district court sentenced Dennison according to a criminal-history score that included the 2016 conviction as a felony. Because the state failed to meet its burden of proof, we reverse and remand the matter for resentencing. *See Strobel I*, 921 N.W.2d at 577. On remand, the district court should provide the state an opportunity "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

Affirmed in part, reversed in part, and remanded.

[4] The state argues that the presentence investigation report included a case number, which contained documents to show that the conviction qualifies as a felony under the applicable statute. The state's argument is unpersuasive. The only references to the 2016 conviction in the record appear in the presentence investigation report and sentencing worksheet, and they do not indicate the amount of controlled substances Dennison possessed. Moreover, we decline to review case records that were not submitted to the district court for the first time on appeal. *See State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002). ("Appellate courts have no more business finding facts after a court trial than after a jury trial."); *see also Fontaine v. Steen*, 759 N.W.2d 672,679 (Minn. App. 2009) ("It is not within the province of appellate courts to determine issues of fact on appeal." (quotation omitted)).