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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0138**

State of Minnesota,
Respondent,

vs.

Conrad James Smith,
Appellant.

**Filed December 28, 2020
Reversed and remanded
Florey, Judge**

Clay County District Court
File No. 14-CR-19-2627

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

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Chief Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Bryan, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant Conrad James Smith challenges his sentence, arguing that the district court erred in its calculation of his criminal-history score—specifically, that the district court erroneously assigned criminal-history points for three convictions that arose out of a single incident and for an alleged federal assault conviction. Because there is insufficient evidence in the record to support the district court’s calculation of Smith’s criminal-history score, we conclude that the district court abused its discretion. But because Smith did not object to the district court’s criminal-history-score calculation at sentencing (and in fact invited the district court to sentence him without examining his non-Minnesota convictions more thoroughly), we remand with instructions to allow the state to supplement the record with evidence to support its position on Smith’s criminal-history score.

FACTS

Smith pleaded guilty to first-degree assault pursuant to a plea agreement that called for a “bottom-of-the-box” sentence. The parties disagreed over what the precise sentence would be because they disagreed over what Smith’s criminal-history score was. But the parties agreed that “whatever we end up with points-wise, it’ll be a bottom-of-the-box sentence.”

A sentencing worksheet completed before sentencing indicated that Smith had a criminal-history score of seven. The worksheet assigned two points in relation to a 2004 federal conviction for assault resulting in serious bodily injury. The worksheet also assigned points in relation to three offenses that all occurred on November 15, 2012.

Because first-degree assault is a severity-level-nine offense, the presumptive range of sentences for Smith, according to the Minnesota Sentencing Guidelines, was 138 months to 192 months with a presumptive sentence of 161 months.¹

At the sentencing hearing, defense counsel argued that the federal conviction should count for one point instead of two and that Smith's criminal-history score should only be six. The prosecutor informed the district court that she was not prepared to argue the criminal-history score because Smith had not filed anything challenging the criminal-history score. Specifically, the prosecutor indicated that she had not seen the federal "complaint or the allegations to be able to argue whether" the conviction should count as one or two criminal-history points.

The district court observed that it would need to continue the sentencing hearing to allow the parties to litigate Smith's criminal-history score. Because the conviction was a federal conviction, the prosecutor said that it would take more time than normal to get information about the conviction. In the midst of this discussion, Smith indicated that he would prefer to "just be sentenced today to the 138 [months]." The district court stated that it would either "[go] forward today with the seven [points] and the 138 [month sentence]" or give Smith "more time" to develop a proper record, and that by choosing to be sentenced to 138 months, Smith effectively waived "the ability to argue that [his] criminal-history score should actually be six and not seven [points]." Smith agreed to

¹ These figures contemplate an additional three months added to the ordinary guidelines sentence because (1) Smith was assigned a custody-status point in his criminal-history score and (2) Smith's criminal-history score of seven exceeded the maximum score on the sentencing grid. See Minn. Sent. Guidelines 2.B.2.c (2018).

waive a calculation of his criminal-history score. The district court sentenced Smith to 138 months' imprisonment.

Smith appeals, arguing that the district court erred by sentencing him according to an incorrect criminal-history score.

D E C I S I O N

Smith argues that the district court abused its discretion by sentencing him with a criminal-history score of seven. “A sentence based on an incorrect criminal history score is an illegal sentence.” *State v. Woods*, 945 N.W.2d 414, 416 (Minn. App. 2020). “[A] defendant may not waive review of his criminal history score calculation.” *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). “When a defendant’s sentence is based on an incorrect criminal-history score, his case must be remanded for resentencing.” *Woods*, 945 N.W.2d at 416-17. “The district court’s determination of a defendant’s criminal-history score will not be reversed absent an abuse of discretion.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

Smith challenges the inclusion of two prior convictions in the calculation of his criminal-history score. First, Smith argues that the district court erroneously assigned criminal-history points for three convictions that arose out of a single incident involving multiple victims. Second, Smith argues that the district court erroneously assigned two points for his federal assault conviction. We address each challenged prior conviction in turn.

I. Assignment of points for a single course of conduct with multiple victims

Smith argues that the district court erroneously assigned criminal-history points for three prior convictions that were part of a single incident. The state concedes that the district court erroneously assigned criminal-history points for these three offenses. The parties agree that Smith should have only been assigned criminal-history points for two of the three offenses and that one point should be removed from his score for his conviction for criminal vehicular operation. After our own review of the issue, we agree.

“When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels.” Minn. Sent. Guidelines 2.B.1.d(2) (2018). The district court assigned points for three offenses arising out of a single incident that occurred on November 15, 2012. The two most serious offenses arising out of this incident are second-degree manslaughter and criminal vehicular operation with negligence—under the influence of alcohol. The district court assigned one and one half points for each of these offenses. But the district court also assigned a criminal-history point for the criminal-vehicular-operation conviction. Accepting the state’s concession that the three offenses arose out of the same course of conduct and involved multiple victims, it was improper for the district court to assign a criminal-history point for the criminal-vehicular-operation conviction because it was the third and least serious offense that arose out of the November 15, 2012 incident.

Because a sentence based on an incorrect criminal-history score is an illegal sentence, the district court abused its discretion by sentencing Smith with a criminal-history score of seven.

II. Assignment of points for Smith’s federal assault conviction

Smith also challenges the inclusion of his federal assault conviction in his criminal-history score. Convictions from jurisdictions other than Minnesota are counted in an offender’s criminal-history score. Minn. Sent. Guidelines 2.B.5 (2018). “The [district] court must make the final determination as to whether and how a prior non-Minnesota conviction should be counted in the criminal history score.” Minn. Sent. Guidelines 2.B.5.a.

The state must lay foundation for the district court to include a non-Minnesota conviction in the defendant’s criminal-history score. *Maley*, 714 N.W.2d at 711. The state has the burden at a sentencing hearing of establishing, by a fair preponderance of the evidence, “that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.” *Id.*

Smith argues that the state did not meet its burden of proving that his federal assault conviction was valid because the only evidence in the record to establish the conviction are the notations in the presentence investigation report (PSI) and the guidelines worksheet. The state maintains that the sentencing worksheet and the PSI, which identified the federal charge and the 63-month sentence imposed, were sufficient to meet its burden of proof by a fair preponderance of the evidence.

The “appropriate standard” of proving a prior conviction is that established in Minn.

R. Evid. 1005:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Maley, 714 N.W.2d at 712 (quoting Minn. R. Evid. 1005).

In light of this standard, we conclude that the district court abused its discretion by assigning points to Smith’s criminal-history score. The state did not provide a certified copy of the conviction, did not present testimony of any witnesses, and made no argument that a copy that complies with the rule “cannot be obtained by the exercise of reasonable diligence.” Minn. R. Evid. 1005. In fact, the state was discussing a continuance of the sentencing hearing to obtain the necessary records when Smith decided to forego a proper criminal-history-score calculation. Because the record does not include evidence of Smith’s federal conviction that complies with rule 1005, we conclude that the district court abused its discretion by assigning points to Smith’s criminal-history score in relation to this conviction.

Smith also argues that the district court did not consider what the equivalent Minnesota offense to the federal offense was, and therefore inappropriately assigned two criminal-history points to the federal offense. We agree.

The weight of a prior non-Minnesota felony conviction “must be based on the severity level of the equivalent Minnesota felony offense.” Minn. Sent. Guidelines 2.B.5.c. The equivalent Minnesota offense is “based on the elements of the prior non-Minnesota offense. Minn. Sent. Guidelines 2.B.5.b. “[W]hile the main focus should be on the offense definition, the sentencing court should also consider the nature of the offense and the sentence received by the offender.” *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992) (quotation omitted).

Smith’s federal conviction was for assault resulting in “serious bodily injury” in violation of 18 U.S.C. § 113(a)(6) (2002). “Serious bodily injury” means bodily injury involving “a substantial risk of death,” “extreme physical pain,” “protracted and obvious disfigurement,” or “protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 18 U.S.C. § 1365(h)(3) (2002).

Minnesota law distinguishes between levels of assault using the terms “bodily harm,” “substantial bodily harm” and “great bodily harm” to refer to escalating levels of harm. *See* Minn. Stat. § 609.221, .223, .224 (2018) (first-degree assault, third-degree assault, and fifth-degree assault). “Bodily harm” means “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2018). Any assault that results in bodily harm constitutes a fifth-degree assault. Minn. Stat. § 609.224, subd. 1.

An assault that results in “substantial bodily harm” is a third-degree assault. Minn. Stat. § 609.223, subd. 1. “Substantial bodily harm” means “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss

or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” Minn. Stat. § 609.02, subd. 7a (2018).

An assault resulting in great bodily harm is a first-degree assault. Minn. Stat. § 609.221, subd. 1. “Great bodily harm” means “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2018). “‘Other serious bodily harm’ is not defined by the statute, and it should be taken in context of the other three alternative definitions.” *State v. Dye*, 871 N.W.2d 916, 922 (Minn. App. 2015) (quotation omitted). “To determine whether a victim’s injuries constitute ‘other serious bodily harm,’ courts must consider the totality of the victim’s injuries.” *Id.*

The federal definition of “serious bodily injury” does not clearly align with our statutes’ definitions of “bodily harm,” “substantial bodily harm,” or “great bodily harm.” Minnesota statutes addressing levels of bodily harm do not expressly contemplate the level of pain an injury causes, and consequently, it is possible that an injury resulting in “extreme physical pain” may constitute any of these levels of harm, depending on the facts and circumstances of the incident. Thus, because there is no clear equivalent Minnesota offense based on elements alone and because the district court did not explain why it assigned two points to Smith’s criminal-history score based on the federal conviction, we conclude that the district court abused its discretion by assigning two criminal-history points in relation to Smith’s federal conviction.

We reverse and remand for resentencing because the district court abused its discretion by sentencing Smith with a criminal-history score of seven. But because Smith did not object to the district court's calculation of his criminal-history score, the state must be allowed to supplement the record with evidence supporting its position that Smith's federal conviction should be assigned two points. *See State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008) (remanding with instructions that the state be allowed to further develop the sentencing record so that the district court can appropriately determine defendant's criminal-history score, where the defendant failed to object to the criminal-history-score calculation at sentencing), *review denied* (Minn. July 15, 2008).

Reversed and remanded.