STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0262

State of Minnesota,
Respondent,

vs.

Percy Leonard French,
Appellant.

Filed November 23, 2020
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Becker County District Court
File No. 03-CR-18-2477

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

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas, Judge.

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

CONNOLLY, Judge

On appeal from his convictions of driving while intoxicated (DWI) and fleeing a peace officer in a motor vehicle, appellant argues that (1) he was denied his constitutional right to confrontation when respondent presented the opinion testimony of an expert that was based on data produced by a machine but the expert was not present when the machine produced the data; (2) the evidence was insufficient to prove his guilt for fleeing a peace officer in a motor vehicle; and (3) he is entitled to be resentenced because there were numerous errors in the calculation of his criminal-history score. We affirm appellant's convictions, but reverse and remand for resentencing.

FACTS

On November 27, 2018, appellant Percy French was arrested on suspicion of DWI. French was then transported to the Becker County Jail where law enforcement applied for a search warrant to obtain a sample of French's blood or urine. The search warrant was granted and the results of French's blood test revealed the presence of amphetamine and methamphetamine. Respondent State of Minnesota subsequently charged French with felony DWI—driving while under the influence of a combination of alcohol and a controlled substance; felony DWI—driving with any amount of a controlled substance; and fleeing a peace officer in a motor vehicle.

Prior to trial, it became known that D.Z., the Bureau of Criminal Apprehension (BCA) scientist who analyzed French's blood, had retired and was unavailable to be called as a witness at trial. French then moved in limine to exclude the introduction of D.Z.'s lab

report if D.Z. was unavailable to testify. The state responded by arguing that a different expert could review D.Z.'s reports and testify at trial about "their own opinion" formed about the contents of the report.

The district court concluded that "the BCA lab report prepared by [D.Z.] is inadmissible unless [D.Z.] herself testifies at trial." But the court "reserve[d] ruling as to whether another BCA scientist may testify as an expert witness at trial, and will seek clarification from the state on the morning of trial as to how this expert's testimony will assist the trier of fact without simply impermissibly introducing the lab report into the record."

At trial, French stipulated to prior convictions that enhanced the DWI charges to felonies. The state then presented evidence that, at about 11:30 p.m. on November 27, 2018, Deputy Matt Gerving observed a pickup traveling northbound on County Road 21 with only one headlight illuminated. After Deputy Gerving turned around to get behind the pickup, he observed the pickup run through a stop sign. Deputy Gerving then activated his emergency lights, but the pickup did not stop. Instead, the pickup swerved into the opposing lane of traffic and began "to weave within its lane back and forth." According to Deputy Gerving, the pickup was traveling between speeds of 20 and 25 miles per hour (mph) as it "was going from lane to lane," which was "very slow, especially for a vehicle that's not stopping."

As Deputy Gerving followed the pickup, it eventually turned left onto Bear Clan Drive and immediately sped up, reaching speeds of approximately 69 mph. The pickup then proceeded onto Pike Trail, which "is a dead-end into a residence." Deputy Gerving

testified that, instead of stopping, the pickup drove through a private yard and eventually struck a boulder and crashed into a ditch alongside an adjacent street.

After the pickup crashed, Deputy Gerving approached the vehicle on foot and observed an individual, later identified as J.G., exit the driver's side door and flee the scene. Deputy Gerving also observed two individuals that remained seated in the pickup. According to Deputy Gerving, French had been sitting in the driver's seat, but "bounce[d] to the center seat"; M.W. was seated in the "far passenger seat." French and M.W. were then detained, and M.W. was placed in the back seat of another squad car that had arrived at the scene; French was placed in the back seat of Deputy Gerving's squad car.

As French was placed in the back seat of the squad car, Deputy Gerving smelled an odor of alcohol. Deputy Gerving then began to question French, and in an audio recording that was played for the jury, French repeatedly denied driving the pickup. But after repeatedly telling French that he knew that French was driving, Deputy Gerving asked French if "that's why you didn't want to get caught driving," to which French replied, "Yeah."

During his interview of French, Deputy Gerving observed that French's eyes were red and glassy, and that his "pupils were pinpoint when in the dark they should have been more dilated." And according to Deputy Gerving, French "became extremely drowsy." French then admitted that he is a "user" and that he was "probably" on both heroin and methamphetamine. But when asked by Deputy Gerving to complete standard field sobriety tests, French refused.

French was arrested and a warrant was obtained for a sample of his blood or urine. Over French's objection, BCA scientist J.S. testified that French's blood had been tested for the presence of controlled substances, but that she was not the analyst who conducted the testing. Although D.Z.'s report was not admitted into evidence, J.S. testified that she independently reviewed the raw data in the file associated with French's case and concluded that French's blood sample showed the presence of amphetamine and methamphetamine.

J.G. and M.W. also testified on behalf of the state. Both claimed that French was the original driver of the pickup, but that French forced J.G. to switch seats and take over as the driver after they saw Deputy Gerving's squad car. In addition to M.W.'s testimony, M.W.'s recorded statement given to Deputy Gerving was played for the jury. M.W.'s statement corroborated his trial testimony that French was driving the pickup when Deputy Gerving activated his squad car lights. M.W. claimed that French switched spots with J.G. because he did not want to go to prison.

The jury found French guilty of the charged offenses. The district court then adjudicated French guilty on count I, felony DWI—driving while under the influence of a combination of alcohol and a controlled substance, and count III, fleeing a peace officer in a motor vehicle. The district court did not adjudicate French guilty on count II. Based on a criminal-history score of 9, the district court sentenced French on count I to 70 months in prison, with five years of conditional release, and a concurrent term of 22 months in prison for count III. This appeal follows.

D E C I S I O N

I.

French argues that the admission of J.S.'s opinion testimony, that French's blood tested positive for a controlled substance, violated his Confrontation-Clause rights because "the BCA scientist who actually performed the test did not testify." This court generally reviews evidentiary decisions for an abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). But whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law that we review de novo. *Hawes v. State*, 826 N.W.2d 775, 786 (Minn. 2013). A violation of the Confrontation Clause is subject to the constitutional harmless-error analysis and does not require reversal if the error is harmless beyond a reasonable doubt. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006).

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Minnesota Constitution's Confrontation Clause is nearly identical, and the same analysis is applied to both the United States and Minnesota versions of the clause. *State v. Holliday*, 745 N.W.2d 556, 564 (Minn. 2008); *see also* Minn. Const. art. I, § 6. "[T]he primary objective behind the adoption of the Confrontation Clause was to regulate the admission of testimonial hearsay by witnesses against the defendant." *State v. Lopez-Ramos*, 929 N.W.2d 414, 417-18 (Minn. 2019) (explaining the Supreme Court's interpretation of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004)). This means that the

Confrontation Clause "prohibits 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007) (quoting *Crawford*, 541 U.S. at 53-54, 124 S. Ct. at 1365).

Whether a statement is testimonial in nature turns on the primary purpose or reason for the statement. *See Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006). The Supreme Court in *Crawford* described the class of testimonial statements that are subject to the Confrontation Clause as follows:

> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52, 124 S. Ct. at 1364 (citations and quotations omitted).

The Supreme Court has applied *Crawford* in cases where evidence regarding the results of forensic testing or analysis was introduced at trial without testimony from the person who performed the testing or analysis. For example, in *Melendez-Diaz v. Massachusetts*, the Supreme Court held that an affidavit reporting the results of the state's drug analysis falls within the "core class of testimonial statements," and the defendant must be afforded his constitutional right to confront the analyst. 557 U.S. 305, 309-11, 129 S. Ct. 2527, 2532-33 (2009). And in *Bullcoming v. New Mexico*, the Supreme Court held that

a certified blood alcohol content report can be used against the defendant only if the defendant has the opportunity to confront, at trial, the analyst who performed, observed, or supervised the forensic examination. 564 U.S. 647, 657, 131 S. Ct. 2705, 2713 (2011). The Supreme Court explained: "In short, when the State elected to introduce [the analyst's] certification, [the analyst] became a witness [the defendant] had the right to confront." *Id.* at 663, 131 S. Ct. at 2716. The Sixth Amendment was not satisfied by a "surrogate" witness who was familiar with the lab's practices but who had formed no independent opinion concerning the forensic examination results. *Id.* at 661-63, 131 S. Ct. at 2715-16.

Minnesota appellate courts have also held that reports prepared by individuals regarding forensic analysis or testing are testimonial statements within the meaning of the Sixth Amendment. In *Caulfield*, the Minnesota Supreme Court concluded that a report prepared by a BCA lab analyst that identified a substance seized from the defendant as cocaine "was testimonial evidence under *Crawford*" when the state offered the report in lieu of calling the analyst as a witness at trial. 722 N.W.2d at 306-07, 309-10. Similarly, in *State v. Weaver*, this court held that a laboratory technician's report regarding the results of carbon-monoxide testing was testimonial, when the state offered testimony from another person regarding the contents of the report instead of calling the lab technician as a witness at trial. 733 N.W.2d 793, 799-80 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

Relying on *Melendez-Diaz*, *Bullcoming*, *Caulfield*, and *Weaver*, French asserts that the district court correctly concluded that D.Z.'s report was testimonial and, therefore, inadmissible. But French contends that the district court erred by concluding that J.S.

"could testify as a surrogate to the ultimate conclusion in [D.Z.'s] report by couching the testimony with the label 'expert opinion' testimony."

We disagree. As the state points out, French does not address this court's decision in *State v. Ziegler*, 855 N.W.2d 551 (Minn. App. 2014). In that case, the defendant was charged with criminal vehicular operation (CVO) and reckless driving. *Ziegler*, 855 N.W.2d at 552. In preparing for trial, a state trooper used computer software to extract data from the defendant's vehicle, such as the vehicle's speed and brake activation prior to the accident at issue. *Id.* The software generated a report containing the data from the defendant's vehicle. *Id.* At trial, however, the prosecution called a different state trooper who provided accident-reconstruction testimony based on his review of the machine-generated report. *Id.* at 552-53. The testifying trooper admitted that he was not present when the software extracted the data from the defendant's vehicle, or when the report was generated. *Id.* at 553. He also admitted that he did not know whether the software was working properly when the vehicle data was extracted, or whether all proper procedures were followed. *Id.*

A jury found the defendant guilty of the charged offenses. *Id.* On appeal, the defendant argued that the district court violated her Sixth Amendment right to confrontation by admitting the data collected from her vehicle through the testimony of a trooper who was not present when the data was collected. *Id.* at 554. This court disagreed, concluding that "machine-generated data that do not contain the statements of human witnesses are not testimonial statements within the meaning of the Confrontation Clause." *Id.* at 558. In reaching its decision, the court recognized that "*Melendez-Diaz, Bullcoming*,

Caulfield, and *Weaver* do not determine the issue presented in this case because in those cases, the objectionable evidence was not limited to machine generated data; it included out-of-court statements made by people regarding the data." *Id.* at 555. But the court stated that "several federal circuit courts have addressed the issue and concluded that such data are not testimonial statements within the meaning of the Confrontation Clause." *Id.* The court then referred to a Seventh Circuit Court case, which "noted that a chemist's report admitted into evidence had 'two kinds of information: the readings taken from the instruments, and the chemist's conclusion that these readings mean that the tested substance was cocaine' and that only 'the latter is testimonial as the Supreme Court used that word in *Crawford*.'" *Id.* at 556 (quoting *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir. 2008)). The court also referenced a Fourth Circuit Court case, which concluded that "'printed data' generated from chromatograph machines operated by lab technicians were not 'statements of the lab technicians who operated the machines' and thus 'not out-of-court statements made by declarants that are subject to the Confrontation Clause.'" *Id.* (emphasis omitted) (quoting *United States v. Washington*, 498 F.3d 225, 229-30 (4th Cir. 2007)).

This case is akin to *Ziegler*. As in *Ziegler*, a machine generated the raw data related to French's blood sample. Under *Ziegler*, the raw data is not testimonial. *See id.* at 558. Although the conclusions in D.Z.'s report are testimonial, the report was not admitted into evidence. Instead, J.S. testified regarding her independent review of the machine-generated data. As in *Ziegler*, the admission of machine-generated data through J.S.'s testimony did not trigger French's right of confrontation under the Sixth Amendment. *See*

id. And as the court noted in *Ziegler*, any question regarding the foundation for J.S.'s opinion is not relevant to French's Confrontation-Clause argument. *See id.* at 558 (stating that the defendant's "concerns regarding the reliability of the data and the data-retrieval process are not resolved under the Confrontation Clause"). Accordingly, J.S.'s testimony about the presence of controlled substances in French's blood did not violate French's right to confrontation.

II.

French argues that the evidence was insufficient to support the jury's finding of guilt for fleeing a police officer in a motor vehicle. When reviewing the sufficiency of the evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "We assume the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). "The verdict will not be overturned if the [jury], upon application of the presumption of innocence and the state's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016).

Under Minnesota law, "[w]hoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, is guilty of a

felony." Minn. Stat. § 609.487, subd. 3 (2018).[1] "[T]he term 'flee' means to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." *Id.*, subd. 1 (2018).

French argues that the evidence presented at trial was insufficient to sustain a finding of guilt for the offense of fleeing a peace officer in a motor vehicle because French's conduct of "switching spots with a passenger" does not satisfy the definition of "fleeing" under section 609.487, subdivision 1. This argument is unpersuasive. A refusal to stop a vehicle "following a signal given by any peace officer to the driver of a motor vehicle," satisfies the definition of fleeing. *See id.*

Here, French's argument focuses primarily on his conduct of switching spots with one of the vehicle's occupants, and ignores the rest of the evidence presented at trial. J.G. and M.W. both testified that French was the original driver of the vehicle, and was in control of the vehicle when the deputy activated his emergency lights. The record also reflects that after the deputy activated his emergency lights, French did not stop the pickup, and instead forced J.G. to switch seats while the pickup was in motion. In fact, French concedes that approximately nine seconds passed between the deputy's activation of his emergency lights and the pickup swerving in the road, which was when French switched spots with J.G. And the record indicates that nothing prevented French from immediately stopping the pickup, such as heavy traffic in the area. Rather, the squad-car video shows

[1] A deputy sheriff is a peace officer under the statute. *See* Minn. Stat. § 609.487, subd. 2 (2018).

no traffic at the time Deputy Gerving was following French. The fact that French was in control of the pickup, but did not stop after the deputy activated his emergency lights, and instead switched spots with a passenger, demonstrates a refusal to stop the vehicle. *See id.* (stating that "flee" means to "refuse to stop the vehicle . . . following a signal given by any peace officer to the driver of a motor vehicle").

French argues that his refusal to stop in the nine seconds that transpired between the time the deputy activated his emergency lights, and the time French switched spots with J.G., is insufficient to demonstrate that he was fleeing a peace officer in a motor vehicle. But French was in control of the pickup and did not stop for nine seconds. Instead, French switched spots with a passenger. The overt act of switching spots with a passenger, rather than stopping the pickup, indicates a refusal to stop the vehicle under section 609.487, subdivision 1.

Moreover, under the fleeing statute, the term "flee" encompasses other acts committed "with intent to attempt to elude a peace officer following a signal given by a peace officer to the driver of a motor vehicle." *Id.* Again, the record reflects that French was the original driver of the vehicle, he switched seats with J.G. after the deputy activated his emergency lights, and the pickup accelerated after the driver switch occurred. And J.G. testified that after he switched spots with French, M.W. and French "kept telling [him] to go so [he] kept going." Taken together, this evidence was sufficient for the jury to reasonably conclude that French used "other means" to elude a peace officer in a motor vehicle. *See* Minn. Stat. § 609.487, subd. 1; *see also State v. Hurd*, 819 N.W.2d 591, 599 (Minn. 2012) (stating that the "totality of the evidence may support a finding of

premeditation even if no single piece of evidence standing alone would be sufficient" (quotation omitted)).

French further argues that the state failed to prove the intent element because there was insufficient evidence to show that he acted with intent to attempt to elude a peace officer. Because intent is a state of mind, it is "generally proved circumstantially—by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

In Minnesota, a two-part test evaluates the sufficiency of circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). The reviewing court first identifies the "circumstances proved and independently consider[s] the reasonable inferences that can be drawn from those circumstances, when viewed as a whole." *Id.* In doing so, this court defers to the jury's decision to accept or reject evidence that is inconsistent with the circumstances proved, according to the applicable standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

At trial, the state proved the following circumstances relevant to the fleeing offense: (1) French was the original driver of the vehicle; (2) after the deputy activated his emergency lights, French drove for about nine seconds and then switched seats with J.G. while the pickup was still in motion; (3) French told J.G. to keep going after they switched spots; (4) the pickup then increased speed and eventually crashed; and (5) French was under the influence of both alcohol and a controlled substance, and was driving without a valid license.

After identification of the circumstances proved by the state, the second step of the circumstantial-evidence test requires us to determine whether "the reasonable inferences that can be drawn from the circumstances proved as a whole [are] consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015). Speculation or conjecture cannot be the basis for a rational hypothesis inconsistent with guilt. *Al-Naseer*, 788 N.W.2d at 480.

French argues that a "reasonable inference can be made that [his] intent by switching spots was to avoid being caught as the driver to avoid a DWI charge, not to flee." But French's argument ignores the fact that French continued to drive for nine seconds after Deputy Gerving activated his emergency lights, and told J.G. to keep going after they switched seats. As the state points out, "[h]ad French only intended to avoid detection as the driver," he "would have encouraged J.G. to pull over once they switched seats." Instead, J.G. fled at a high rate of speed in response to French's directive "to go." The totality of the evidence presented permitted the jury to reasonably infer that French acted with intent to elude Deputy Gerving, and excluded any rational hypothesis except that of guilt. *See Cooper*, 561 N.W.2d at 179 (stating that when considering a defendant's intent, "the jury may infer that a person intends the natural and probable consequences of his actions"); *see also State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (upholding conviction based on circumstantial evidence when, viewed as a whole, the evidence led directly to guilt). Accordingly, the evidence was sufficient to sustain the jury's finding of guilt for the offense of fleeing a peace officer in a motor vehicle.

III.

French argues that the district court made a number of errors that entitle him to resentencing. Specifically, he contends that the state cannot meet its burden to show that French's criminal-history score was properly calculated because (1) he was erroneously assigned three criminal-history points for his two 2004 DWI convictions; (2) the sentencing worksheet improperly included a one-half criminal-history point for French's fleeing-a-peace-officer-in-a-motor-vehicle conviction when the DWI offense occurred before the fleeing offense; and (3) his fifth-degree controlled-substance-crime conviction should not have been included in his felony criminal-history score where the state did not prove that the offense would be a felony under the law at the time of sentencing. French also contends that based on a proper calculation of his criminal-history score, he does not qualify for the three-month custody-status enhancement that was imposed on him at sentencing. Finally, French argues that he should be awarded one more day of jail credit. Although the state agrees that French is entitled to resentencing, we address each argument in turn.

A. Calculation of French'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 state bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). 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); *State v.*

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

1. Assignment of three criminal-history points for the 2004 DWI convictions

French argues that he was erroneously assigned three criminal-history points for his two 2004 DWI convictions because the presentence investigation (PSI) states that only one sentence was imposed for these convictions. We agree. Based on our review of the PSI, only one sentence was imposed for French's two 2004 DWI convictions. The state agrees that it was "error to assign [three] criminal-history points for the two [2004 DWI] convictions, instead of 1.5 criminal-history points for one of the convictions." And the state agrees that without this error, French would have had a criminal-history score of 7.5, rather than 9, for count I. Thus, as the state agrees, French is entitled to be resentenced.

2. Improper assignment of one-half criminal-history point for the offense of fleeing a peace officer in a motor vehicle

French also contends that he was erroneously assigned a one-half criminal-history point for the offense of fleeing a peace officer in a motor vehicle because the DWI offense occurred before the fleeing offense. Again, we agree. "*Hernandize*" is "the unofficial term for the process described in section 2.B.1.e. [of the sentencing guidelines] of counting criminal history when multiple offenses are sentenced on the same day before the same court." Minn. Sent. Guidelines 1.B.(10) (2018); *see State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). Minn. Sent. Guidelines 2.B.1.e. of the guidelines provide: "Multiple offenses sentenced at the same time before the same court must be sentenced in the order

in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced." Minn. Sent. Guidelines 2.B.1.e. (2018).

Here, because the DWI offense occurred before the fleeing offense, the district court appropriately sentenced French for the DWI offense first. But French's sentencing worksheet assigned a one-half criminal-history point for the fleeing offense on the basis that the fleeing offense be sentenced before the DWI offense. In sentencing French, the district court adopted the sentencing worksheet's assignment of a one-half criminal-history point for the fleeing offense even though the DWI offense had been sentenced first. We agree, as does the state, that because the DWI offense was sentenced before the fleeing offense, "[i]t was error to include half of a criminal history point for the fleeing conviction in calculating French's criminal history score on Count I."

3. Fifth-degree controlled substance offense

Relying on *Strobel*, French argues that the district court improperly assigned a one-half criminal-history point for his 2016 fifth-degree controlled-substance offense because the state failed to prove that the offense would be a felony under the current law. In *Strobel*, the defendant was convicted of two controlled-substance crimes, including a prior offense from 2012, and a subsequent offense which occurred in 2016. 932 N.W.2d at 305. The defendant's criminal-history score at the time he was sentenced for the 2016 offense included a felony half point for the prior offense from 2012. *Id.* On appeal, the defendant argued that the district court improperly included the felony half point for the 2012 offense. *Id.* at 306. Relying on the 2016 Drug Sentencing Reform Act (DSRA), the defendant argued that "because his prior offense would be a gross misdemeanor after the effective

date of the DSRA, the district court erred in classifying it as a felony" for purposes of his criminal-history score, without the state proving that his prior offense should be classified as a felony. *Id.*

The supreme court agreed. It noted that four years after the defendant's 2012 conviction and sentence, the legislature enacted the 2016 DSRA. *Id.* at 305. Under the DSRA, "fifth-degree *sale* of a controlled substance remains a felony, but some first-time fifth-degree *possession* offenses are now classified as gross misdemeanors." *Id.* (citing 2016 Minn. Laws ch. 160, § 7, at 576, 583-85 (codified at Minn. Stat. § 152.025 (2016))). The supreme court explained further that the Minnesota Sentencing Guidelines provide that "[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." *Id.* at 307. Applying the rules of statutory interpretation, the supreme court determined that "offense definitions" as used in the sentencing guidelines, refers to "the element-based definitions of crimes" found in Minnesota 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." *Id.* at 304, 309-10.

Here, in sentencing French, the district court included a one-half point for French's fifth-degree possession conviction from 2016. But, as the state agrees, it "did not prove whether [French's] prior conviction for fifth-degree controlled substance crime was a felony or gross misdemeanor." *See 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). And, as the state agrees, "[b]ecause [it] did not prove that French's prior fifth-degree controlled substance crime is a felony under the law at the time of sentencing, the district court may have erred in assigning him half of a criminal-history point for that offense." Therefore, because the state failed to meet its burden in calculating French's criminal-history score, we remand the matter for resentencing.

B. Custody-status enhancement

French further argues that, with a proper calculation of his criminal-history score, he does not qualify for the three-month custody-status enhancement that was imposed on him at sentencing. Under the sentencing guidelines, a defendant's presumptive sentencing range is subject to a three-month custody enhancement when: "(1) a custody status point is assigned; and (2) the offender's total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more)." Minn. Sent. Guidelines 2.B.2.c. (2018). But as we concluded above, the state has not met its burden to show that French's criminal-history score was properly calculated. After French's criminal-history score is properly calculated, his criminal-history score may be less than seven points, meaning that French may not qualify for the three-month custody-status enhancement. Such a determination should be made on remand.

C. Jail credit

Finally, French argues that he should be awarded one more day of jail credit because the squad-car video shows that he was taken into custody at 11:35 p.m. on November 27, 2018. We agree. A defendant is entitled to jail credit beginning from the date he was arrested. *See State v. Carson*, 393 N.W.2d 382, 384 (Minn. App. 1986). The supreme

court has held that a defendant is entitled to full jail credit for both the first and last days of confinement, even if only a part of those days is spent in custody. *State v. Jackson*, 557 N.W.2d 552, 553-54 (Minn. 1996).

Here, the record reflects that French was arrested on November 27, 2018. But the PSI indicates that French did not receive jail credit for that day. Instead, the PSI reflects that French's jail credit was calculated beginning on November 28, 2018, the date he was booked in the county jail. Because French is entitled to jail credit for the day he was arrested, he is entitled to one more day of jail credit. *See Carson*, 393 N.W.2d at 384.

Affirmed in part, reversed in part, and remanded.