STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1282

State of Minnesota,
Respondent,

vs.

Jeremy Simon Garcia,
Appellant.

Filed May 2, 2022
Affirmed
Bryan, Judge

Mower County District Court
File Nos. 50-CR-18-2502, 50-CR-19-1158

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

Kristen Nelsen, Mower County Attorney, John L. Brooks, Assistant County Attorney, Austin, Minnesota (for respondent)

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

Considered and decided by Bryan, Presiding Judge; Jesson, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges the sentences imposed for two convictions, arguing that the district court erred when it included an out-of-state conviction in the calculation of his criminal history score. Because we conclude that the state established that the out-of-state

conviction was equivalent to a Minnesota felony, we affirm the calculation of the criminal history score and the two sentences imposed.

FACTS

On November 27, 2018, respondent State of Minnesota charged appellant Jeremy Simon Garcia with first-degree aggravated robbery. Garcia entered a guilty plea to the charge and was conditionally released pending sentencing. While on conditional release, Garcia was charged with felony escape from custody for removing his GPS monitoring bracelet. At his sentencing hearing, Garcia pleaded guilty to the new charge, and the district court sentenced him to a term of 129 months in prison for the aggravated robbery offense and a concurrent term of 26 months in prison for the new escape offense. Garcia appealed his sentences, challenging the calculation of his criminal history score and arguing that the sentence imposed for the aggravated robbery conviction violated the terms of the plea agreement. This court determined that the sentence imposed did not violate the plea agreement, but we reversed and remanded for resentencing on both offenses to consider Garcia's objections to the criminal history score. *See State v. Garcia*, 2021 WL 772557 (Minn. App. Mar. 1, 2021).

At the resentencing hearing, Garcia specifically challenged the inclusion of a Texas burglary conviction.[1] The district court received testimony from the probation officer who prepared the sentencing worksheets and admitted, without objection, the most recent pre-sentencing investigation report as well as certified records regarding the out-of-state

[1] Garcia's criminal history includes multiple out-of-state convictions, but Garcia only challenges the inclusion of the Texas burglary conviction.

convictions. According to the testimony given, the probation officer reviewed the Texas statutes, the records relating to the Texas burglary offense, the facts expressly stated in the indictment, and the judgment of conviction. The probation officer concluded that the Texas burglary offense involved a theft of property and that it was equivalent to a felony in Minnesota.

The district court also admitted the indictment for the Texas burglary conviction. The indictment states that on or about September 23, 2016, Garcia "enter[ed] a building not there and then open to the public without the effective consent of [] the owner with the intent to commit theft" and "therein attempted to commit and committed theft of certain property to wit: Ten (10) Apple I-Pads, and Four (4) Dell Computer Monitors, owed by [the owner]." The indictment is based solely on these allegations of theft and does not include any facts relating to any alternative methods of committing burglary, such as facts regarding entering a building intending to commit or actually committing an assault. According to the judgment of conviction, which the district court also admitted, Garcia pleaded guilty to the charges in the indictment, received a suspended, two-year term of imprisonment, and was placed on supervised probation for five years. The state did not offer into evidence a transcript of the plea colloquy, and Garcia gave no testimony that the facts in the indictment differed from what he admitted at the plea hearing in Texas.

The district court determined that the probation officer testified credibly and concluded that Garcia's Texas burglary conviction was the equivalent of a felony third-degree burglary in Minnesota. The district court assigned this Texas conviction one criminal history point and determined that Garcia had a total criminal history score of six.

The district court then imposed the same sentence it had previously imposed for both offenses: a term of 129 months in prison for the aggravated robbery offense and a concurrent term of 26 months in prison for the escape offense. Garcia appeals.

DECISION

Garcia challenges the calculation of his criminal history score, arguing that the Texas burglary conviction could have involved an intent to commit an assault, without an actual assault occurring. A conviction in Texas under these facts, Garcia asserts, would be the equivalent of a gross misdemeanor fourth-degree burglary in Minnesota. Because the specific facts in the Texas burglary indictment concern theft and do not include any facts relating to assault, we conclude that the district court did not abuse its discretion when it determined that the Texas burglary was the equivalent of a Minnesota felony.

The sentencing guidelines "provide uniform standards for the inclusion and [weighing] 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 in calculating an offender's criminal history score under the guidelines. *Id.*; *see also* Minn. Sent. Guidelines 2.B.5.a (2018). An out-of-state conviction may be counted as a felony only if it would be defined as a felony in Minnesota "based on the elements of the prior non-Minnesota offense" and "the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b (2018). The state bears the burden 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). "The state must establish

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." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). We review a district court's determination of a defendant's criminal history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002).

We begin with a discussion of the language of the Texas and Minnesota burglary statutes before considering the evidence presented by the state. In Texas, a person commits a burglary when the person enters a building "without the effective consent of the owner . . . with the intent to commit a felony, theft, or an assault," Tex. Penal Code § 30.02(a)(1) (2018), or enters a building and "commits or attempts to commit a felony, theft, or an assault," Tex. Penal Code § 30.02(a)(3) (2018).[2]

In Minnesota, a person commits a felony burglary when that person enters a building, without consent, and while in the building, either has the "intent to steal or commit any felony or gross misdemeanor," or actually "steals or commits a felony or gross misdemeanor." Minn. Stat. § 609.582, subd. 3. (2018) (defining third-degree burglary and setting forth the maximum penalty: a term of imprisonment not to exceed five years); Minn. Stat. § 609.02, subd. 2 (2018) (defining "felony" as any crime for which a term of imprisonment of more than one year may be imposed).

[2] We note that both Texas and Minnesota have statutes that criminalize certain types of assault offenses as misdemeanors and other types as felony offenses. *See* Tex. Penal Code § 22.01 (2018) (setting forth both felony and misdemeanor types of assault); Minn. Stat. §§ 609.221, .222, .223, .2231, and .224 (2018) (setting forth felony, gross misdemeanor, and misdemeanor types of assault). The parties only dispute the application of the Texas and Minnesota statutes regarding a misdemeanor-level assault.

A person commits a gross-misdemeanor burglary offense in Minnesota when that person enters a building, without consent, and while in the building, either has the "intent to commit a misdemeanor other than to steal" or actually "commits a misdemeanor other than to steal." Minn. Stat. § 609.582, subd. 4 (2018) (defining fourth-degree burglary and setting forth the maximum penalty: a term of imprisonment not to exceed one year); Minn. Stat. § 609.02, subd. 4 (2018) (defining gross misdemeanor as any crime for which a term of imprisonment of more than 90 days, but equal to or less than one year, may be imposed).[3]

Comparing the burglary statutes of Texas and Minnesota, we reach two important conclusions. First, we observe that any burglary involving a theft is a felony in Minnesota. We reach this conclusion because the provision defining fourth-degree burglary expressly excludes stealing and the provision defining third-degree burglary expressly includes stealing. *Compare* Minn. Stat. § 609.582, subd. 3 ("[w]hoever enters a building without consent and with intent to steal . . . or enters a building without consent and steals . . . commits burglary in the third degree) *with* § 609.582, subd. 4 ("[w]hoever enters a building without consent and with intent to commit a misdemeanor *other than to steal* . . . or enters

[3] The burglary statute also defines first- and second-degree burglary. First-degree burglary involves entering a dwelling while another is present in the dwelling, while possessing a dangerous weapon or other similar item, or committing an assault while in the building. Minn. Stat. § 609.582, subd. 1 (2018). Second-degree burglary involves entering certain types of buildings without consent (such as a dwelling, a pharmacy, a banking business, and a religious establishment, among others) or entering a building while possessing "a tool to gain access to money or property." Minn. Stat. § 609.582, subd. 2 (2018). Given our decision that the district court did not abuse its discretion when it determined that the Texas burglary conviction was equivalent to a third-degree burglary offense in Minnesota, we need not determine whether the Texas burglary conviction would also constitute first- or second-degree burglary in Minnesota.

a building without consent and commits a misdemeanor *other than to steal* . . . commits burglary in the fourth degree" (emphasis added)).[4] Similar conduct would constitute a burglary in Texas. Tex. Penal Code § 30.02(a)(1) (relating to entering a building with the intent to commit "a felony, *theft*, or an assault"); Tex. Penal Code § 30.02(a)(3) (relating to actually committing "a felony, *theft*, or an assault" while in the building (emphasis added)). Thus, if Garcia's Texas burglary conviction involved stealing or entering the building with the intent to steal, then the Texas burglary conviction would be the equivalent of a Minnesota felony.

Second, we observe that any burglary involving the commission of a misdemeanor-level assault is a felony in Minnesota. *State v. Olson*, 382 N.W.2d 279, 282 (Minn. App 1986) (holding that the word "assault" in section 609.582, subdivision 1 "includes misdemeanor assault" and stating that "the State need not prove assault in excess of misdemeanor assault in order to prove first degree burglary"). Similar conduct would also constitute a burglary in Texas. Tex. Penal Code § 30.02(a) (defining burglary as entering a building without consent and committing "a felony, theft, or an *assault*" (emphasis added)). Thus, if Garcia's Texas burglary conviction involved committing an assault, then the Texas burglary conviction would be the equivalent of a Minnesota felony.

On appeal, Garcia acknowledges both conclusions. Garcia's argument on appeal, however, concerns one theoretical possibility that he believes the state failed to rule out: if

[4] Garcia makes no argument regarding the value of the property, and we note that the Minnesota burglary statute makes it a felony to enter a building with the intent to steal or actually stealing property, without regard to the value of the property.

Garcia entered a building without consent and with the intent to commit a misdemeanor-level assault, but never actually committed the misdemeanor assault, he could have violated the Texas burglary statute while only committing the equivalent of a gross misdemeanor burglary in Minnesota. Assuming without deciding that Garcia's interpretation of the Texas and Minnesota statutes is correct, we conclude that the evidence presented was sufficient to rule out this possibility.

As noted above, the state bears the burden to prove the Minnesota equivalent of the foreign offense by a preponderance of the evidence. *Maley*, 714 N.W.2d at 711. The state introduced the Texas burglary indictment as well as uncontested evidence establishing the fact of the Texas burglary conviction. The specific factual allegations in the indictment relate only to theft. The indictment first states that Garcia "enter[ed] a building . . . without the effective consent of [the owner] with the intent to commit theft." In a second section of the indictment, the allegations include a description of the property that Garcia allegedly stole: Garcia "enter[ed] a building . . . without the effective consent of [the owner], and therein attempted to commit and committed theft of certain property to wit: Ten (10) Apple I-Pads, and Four (4) Dell Computer Monitors, owed by [the owner]." Garcia does not dispute these facts or challenge the admission of the indictment. The indictment contains no facts regarding an assault, an intent to commit an assault, or whether Garcia expected to or actually did encounter any other persons while inside the building. The probation officer also testified that in her review and opinion, Garcia admitted the facts in the indictment when he pleaded guilty to that offense. Again, there is no evidence to the

contrary.[5] Based on this uncontroverted evidence, the state carried its burden and the district court did not abuse its discretion when it included the Texas burglary conviction in the calculation of Garcia's criminal history score.

Affirmed.

[5] We acknowledge that the state could have introduced the transcript of the out-of-state plea. Doing so would likely remove any doubt regarding the facts of the Texas burglary. Introducing such proof is not required to prove the foreign conviction by preponderance of the evidence in this case because the uncontested, specific facts in the indictment are consistent with only one possible theory of committing the foreign offense. *Cf. Shepard v. United States*, 544 U.S. 13, 26 (2005) (concluding that when reviewing a prior conviction for purposes of applying the federal Armed Career Criminal Act, a court is generally precluded from considering police reports and is limited to considering "the terms of the charging document, the terms of a plea agreement or transcript of colloquy . . . or to some comparable judicial record of this information"); *but see State v. Johnson*, 411 N.W.2d 267, 270 (Minn. App. 1987) (concluding that the state failed to carry its burden because the parties relied on "contradictory statements made by appellant and complainant in [the foreign] prosecution," and "there is no trial court determination of which version of the facts is more credible").