This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0655

State of Minnesota,
Respondent,

vs.

Albert Lee Mahone, III.,
Appellant.

Filed October 2, 2023
Reversed and remanded
Wheelock, Judge

Hennepin County District Court
File No. 27-CR-20-21042

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

Mary F. Moriarty, Hennepin County Attorney, Adam Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Wheelock, Judge; and Kirk, Judge.[*]

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

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this appeal from the district court's sentence for third-degree assault, appellant argues that the district court erred in calculating his criminal-history score by including felony points for a conviction that arose from the same course of conduct as two other convictions for which felony points were properly assigned. We agree, and we reverse and remand for resentencing.

FACTS

On October 1, 2020, respondent State of Minnesota charged appellant Albert Lee Mahone III with one count of third-degree assault and one count of domestic assault by strangulation. The complaint alleged that, on September 25, 2020, law enforcement responded to a report of domestic assault and spoke with a woman, F.H., who stated that Mahone assaulted her. F.H. reported that Mahone came to her residence and hit, kicked, and stomped on her, ripped out chunks of her hair, bit her ear, and strangled her until she was unable to breathe. The complaint also indicated that the state may seek an aggravated sentence because the assault occurred in F.H.'s home, a location in which F.H. had an expectation of privacy.

On January 6, 2023, Mahone pleaded guilty to third-degree assault pursuant to a plea agreement. He admitted that he engaged in a physical altercation with F.H. and that during the altercation, he ripped out some of her hair and injured her ear. In exchange for Mahone pleading guilty to third-degree assault, the state agreed not to enhance the assault charge to first degree, not to seek an aggravated sentence, and to dismiss the

domestic-assault-by-strangulation charge. The parties believed that the presumptive sentencing range was "somewhere between 24, 30 months," and the state indicated that it would ask the district court to sentence Mahone at the top of that presumptive range.

Prior to sentencing, a probation officer prepared and filed a presentence-investigation (PSI) report. The PSI report indicated that Mahone's criminal-history score was seven. As relevant here, Mahone's criminal-history score included one and one-half felony points for each of three aggravated-robbery convictions from 2001.[1] Mahone received an additional two and one-half felony points for other convictions, yielding a felony-point total—and overall criminal-history score—of seven.[2] Based on a criminal-history score of seven and an offense-severity level of four for the third-degree-assault offense, the presumptive sentencing range was 29-39 months in prison, with a presumptive sentence of 33 months, instead of "24, 30 months."

At sentencing, Mahone argued that the PSI report did not accurately calculate his criminal-history score. He argued that the three aggravated-robbery convictions arose out of a single course of conduct and therefore only two of the convictions were eligible to be included in his criminal-history score. Defense counsel provided the district court with an order from a different district court judge who had considered the exact same issue in an

[1] Mahone was 16 years old at the time of the aggravated-robbery offenses but was designated for extended juvenile jurisdiction (EJJ) and placed on probation. The district court ultimately revoked probation following a series of probation violations, and it executed adult sentences for the convictions in 2009.

[2] Mahone was also assigned one half of a custody-status point, but that was rounded down to zero and thus did not impact his overall criminal-history score.

unrelated case involving Mahone and had determined that only two of the three aggravated-robbery convictions counted toward his criminal-history score because they arose out of a single course of conduct.

Had the district court here counted only two of the aggravated-robbery convictions in calculating Mahone's criminal-history score, his criminal-history score would have been five and the presumptive range would have been 23-32 months in prison. In response to Mahone's argument, the state indicated that it was not opposed to using a range of 23-32 months and noted that it had "consistently held the position that [it] will argue for 30 months" and would honor that position.

The district court rejected Mahone's argument and sentenced him, based on a criminal-history score of seven, to 29 months in prison. That sentence is a bottom-of-the-box sentence under the presumptive sentencing range the district court used.

Mahone appeals his sentence.

DECISION

This court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. "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) (citing *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007)). This court reviews a district court's calculation of a defendant's criminal-history score for an abuse of discretion but reviews de novo its interpretation and application of the sentencing guidelines. *State v. Oreskovich*, 915 N.W.2d 920, 926 (Minn. App. 2018). "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.

Mahone argues that the district court abused its discretion when calculating his criminal-history score by including one and one-half felony points for each of his three prior aggravated-robbery convictions. The sentencing guidelines provide the following instruction on how to assign criminal-history points when a defendant received multiple felony sentences in a prior case: "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'g Guidelines 2.B.1.d(2) (2020) (emphasis added). Accordingly, we must consider whether the district court abused its discretion by determining that Mahone's aggravated-robbery convictions did not arise from a single course of conduct. In doing so, we rely on caselaw analyzing the single-course-of-conduct rule in Minn. Stat. § 609.035 (2020). *See* Minn. Sent. Guidelines cmt. 2.B.116 (2020) ("Legal authorities use the terms 'single course of conduct' and 'single behavioral incident' interchangeably. In the Guidelines, this is referred to as 'single course of conduct.'").[3]

[3] Minnesota Statutes section 609.035, subdivision 1, generally prohibits the district court from imposing multiple sentences for offenses that arose from a *single behavioral incident*, whereas the sentencing guidelines limit how the district court assigns criminal-history points for prior offenses for which a defendant was sentenced and which arose from a *single course of conduct*. *See* Minn. Sent'g Guidelines 2.B.1.d(2). Here, Mahone received sentences for all three aggravated-robbery convictions because each conviction involved a different victim. The relevant issue in this appeal is whether all three of Mahone's prior aggravated-robbery convictions arose from a *single course of conduct* under the sentencing guidelines and so one of the convictions should be excluded when calculating his

Whether multiple offenses arose out of a single course of conduct presents a mixed question of fact and law. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review findings of fact for clear error and the application of the law to those facts de novo. *Id.* "Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective." *Id.* Additionally, caselaw has recognized that when a defendant commits a crime and then flees the scene to avoid apprehension, the fleeing offense and the original offense arise from a single course of conduct. *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (listing cases); *State v. Boley*, 299 N.W.2d 924, 925-26 (Minn. 1980) (same). The state bears the burden of proving that multiple offenses were not committed as part of a single course of conduct. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983).

The record here contains limited information about the circumstances surrounding Mahone's prior robbery convictions. According to the PSI report, on September 22, 2001, while fleeing a robbery, Mahone approached a woman and demanded that she give him her keys. Mahone was unable to start her vehicle, so he fled on foot. Law enforcement responded, and while pursuing Mahone, officers encountered three men at a bus stop who reported that they were robbed at gunpoint. Mahone's codefendant later admitted that he had a gun and intended to rob the three men, and Mahone admitted to participating in the robbery and was identified by the woman. Mahone was adjudicated delinquent on three

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criminal-history score; the issue is not whether he was properly sentenced for all three offenses in the previous case. To avoid confusion, this opinion uses "single course of conduct" because the focus remains on the sentencing guidelines.

counts of aggravated robbery—one for each of the men at the bus stop—and one count of simple robbery for trying to steal the vehicle.[4] The district court initially placed Mahone on probation, but following a series of violations, the district court revoked Mahone's probation and executed a 48-month sentence for each aggravated-robbery conviction, to be served concurrently.

As noted above, a different district court judge previously considered whether all three aggravated-robbery convictions should be included to calculate Mahone's criminal-history score. That judge noted that the offenses arose when "Mr. Mahone robbed three people at the bus stop, saw a police car driving by, then ran into a parking lot where he knocked [on] a woman's car, slid in through the window when she rolled it down, and then asked for the keys." The judge determined that the "actions indicate a single criminal objective, to successfully complete a robbery. The requirements for a single behavioral incident are met." Based on this determination, that judge assigned criminal-history points for only the two most severe offenses. In contrast, at the sentencing hearing here, the district court indicated that it had read the other judge's order and that "it d[id] not seem accurate . . . given the nature of that underlying offense, the way it occurred, and the victims," but provided no further explanation for its assessment of that order.

[4] The district court correctly did not assign any criminal-history points for the simple-robbery conviction. The simple-robbery offense occurred when Mahone was fleeing the scene of the aggravated robberies and attempting to avoid apprehension by law enforcement. As previously noted, offenses that are committed while a defendant is fleeing a crime scene and attempting to avoid apprehension are considered part of the same course of conduct. *Gibson*, 478 N.W.2d at 497.

Having considered the surrounding circumstances, we conclude that the robbery convictions arose from a single course of conduct because they occurred at the same time and place and were motivated by a single criminal objective. *See Jones*, 848 N.W.2d at 533. First, the aggravated robberies all occurred when Mahone and his codefendant approached the victims while they were waiting at the same bus stop; the robberies therefore occurred at substantially the same time and place, if not simultaneously. Second, the aggravated robberies were motivated by a single criminal objective—to deprive the victims of their possessions and to complete the robbery. *Id.*

Moreover, the state bears the burden of establishing that the convictions did not arise out of a single course of conduct. *McAdoo*, 330 N.W.2d at 109. In its brief to this court, the state "acknowledges that it did not argue, supplement the record to establish, or otherwise take the position that the 2001 incident was not part of a single course of conduct." Under these circumstances, the state agrees that, pursuant to Minnesota Sentencing Guidelines 2.B.1.d(2), Mahone should be assigned criminal-history points for only two of the aggravated-robbery convictions—the two most severe offenses that arose from the course of conduct. We agree with the parties that Mahone is entitled to resentencing based on a criminal-history score of five.[5]

[5] Mahone was originally sentenced based on a criminal-history score of seven. All of Mahone's criminal-history points are attributed to prior felony convictions. When the one and one-half points attributed to the third aggravated-robbery conviction are removed, the result is a felony-weight total of five and one-half points, which must be rounded down to five. *See* Minn. Sent'g Guidelines 2.B.1.i (2020) ("If the sum of the [felony] weights results in a partial point, the point value must be rounded down to the nearest whole number.").

Finally, Mahone argues that "[t]he district court should resentence Mahone at the bottom of the new presumptive range" because the district court imposed a bottom-of-the-box sentence when sentencing him based on the incorrect criminal-history score. In *Oreskovich*, this court determined that the appellant was sentenced based on an incorrect criminal-history score, so it reversed and remanded for resentencing. 915 N.W.2d at 928-29. Oreskovich also argued that "because he received the middle-of-the-box sentence under the guidelines . . . using an incorrect criminal-history score, [this court] should order the district court on remand to resentence appellant to the new middle-of-the-box sentence." *Id.* at 928. This court rejected that argument and explained: "Appellant is entitled to resentencing using his correct criminal-history score. But our caselaw does not require that he receive a similarly situated sentence within the new presumptive range. And sentencing is properly a function of the better-positioned district court." *Id.* (quotation omitted). We therefore decline to direct the district court to impose a specific sentence and instead reverse and remand for the district court to exercise its discretion when sentencing Mahone based on a criminal-history score of five.

Reversed and remanded.