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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1030**

State of Minnesota,  
Respondent,

vs.

Steven White,  
Appellant.

**Filed June 11, 2012  
Affirmed in part, reversed in part, and remanded  
Larkin, Judge**

Hennepin County District Court  
File No. 27-CR-10-46189

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Harten,  
Judge.\*

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

## UNPUBLISHED OPINION

**LARKIN**, Judge

Appellant challenges his convictions of and sentence for first-degree aggravated robbery, kidnapping, and prohibited person in possession of a firearm, arguing that the district court abused its discretion by granting the state's impeachment motion, erred by failing to obtain a jury-trial waiver before accepting his stipulation regarding the existence of an essential element of one of the offenses, and erroneously calculated his criminal-history score. Appellant also raises additional issues in his pro se supplemental brief, including the sufficiency of the evidence. We affirm appellant's convictions, but we reverse his sentence and remand for resentencing.

### FACTS

Appellant Steven White was charged by amended complaint with first-degree aggravated robbery, kidnapping, and prohibited person in possession of a firearm. The case was tried to a jury. According to the evidence presented at trial, J.S. went to a gas station around 11 p.m. to purchase various items. After he made his purchase and was walking from the gas station toward his truck, J.S. noticed two male individuals. One of the individuals wore lighter-colored clothing, and the other individual wore a dark-colored sweatshirt. The man in the dark-colored sweatshirt, later identified as appellant, approached J.S. from behind and said, "You know what time it is." Next, appellant reached under his sweatshirt, pulled out a gun, cocked it, and pointed it at J.S. Appellant took \$280 out of J.S.'s pocket, as well as J.S.'s cell phone and watch. Appellant told J.S. to get into J.S.'s truck. J.S. refused and attempted to give appellant the keys. Appellant

responded, "Get in the truck or I'll pop your a--." J.S. got into the driver's side of his truck, appellant got into the passenger seat, and the man in the lighter-colored clothing got into the backseat. Appellant told J.S. to drive, and J.S. responded that his truck did not have much gas. Appellant then told J.S. to get out of the driver's seat and get into the backseat.

Appellant drove J.S.'s truck, eventually stopped, and ordered J.S. out of the truck. Appellant told J.S. that his truck would be parked on 17th and Minnehaha Parkway. As appellant drove J.S.'s truck away, J.S. heard three gunshots. J.S. walked slowly to the area of 17th and Minnehaha. His truck was parked there, and the keys to the truck were on the seat. J.S. noticed that appellant had left his baseball hat on the floor of J.S.'s truck. J.S. drove to his sister's house, where he called the police.

On cross-examination, defense counsel alluded that J.S. may have known appellant and the other man, "E", prior to this incident. He also alluded that J.S. may have owed "E" money and sold "E" some "bad dope."

During the investigation of the incident, J.S. viewed two sequential photographic lineups prepared by the police, but he did not identify any of the individuals as either of the robbery suspects. Appellant's picture was not included in either of the lineups. While viewing a third photographic lineup approximately 14 months after the robbery, J.S. identified appellant as one of his assailants. A subsequent DNA analysis determined that the predominate DNA profile found on the hat left in J.S.'s vehicle matched appellant's DNA.

At trial, appellant agreed to stipulate to the fact that he has a prior federal conviction that makes him ineligible to possess a firearm. After the state rested, the district court considered the state's motion to impeach appellant with his federal conviction for aiding and abetting an armed bank robbery if he chose to testify. Appellant argued that the impeachment evidence would "silence" him and that it was "important that the jury hear his side of the story . . . because . . . [J.S.] has come and testified in this case and there have been a lot of unanswered questions, even after his testimony." The district court considered the admissibility of the prior conviction for impeachment purposes and ruled that the state would be permitted to impeach appellant if he testified. Appellant decided that he would not testify, "based on the [c]ourt's ruling." Appellant called no witnesses and rested his case. The case was submitted to the jury, and the jury found appellant guilty of all three charges.

The district court sentenced appellant to a prison term of 108 months on the aggravated robbery conviction, 60 months on the prohibited-person conviction, and 60 months on the kidnapping conviction, all to run concurrently. This appeal follows.

## **D E C I S I O N**

### **I.**

Appellant challenges the district court's decision to allow the state to impeach him with a prior conviction. "We review a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion." *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). When ten or fewer years have elapsed since a felony conviction, evidence of the conviction may be admitted for impeachment purposes, provided that the

probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). In determining whether the probative value of the evidence outweighs its prejudicial effect, a district court is guided by the following five factors: “(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant’s subsequent history, (3) the similarity of the past crime with the charged crime, (4) the importance of the defendant’s testimony, and (5) the centrality of the credibility issue.” *State v. Hill*, 801 N.W.2d 646, 653 (Minn. 2011) (quotation omitted).

The district court discussed each of the five factors on the record and concluded that the probative value of the prior conviction outweighed any prejudicial effect. First, the district court found that appellant’s prior felony conviction had impeachment value, correctly reasoning that “all convictions have some impeachment value.” *See id.* at 652-53 (holding that it was not an abuse of discretion to allow impeachment evidence of an unspecified felony conviction and recognizing that “any felony conviction is probative of a witness’s credibility, and the mere fact that a witness is a convicted felon holds impeachment value”). The district court also found that appellant’s conviction fell within the ten-year time frame.

As to the similarity of appellant’s prior conviction and the charged crime, the district court stated that aiding and abetting an armed bank robbery is dissimilar from the charged offense of aggravated robbery. Appellant argues that “[b]oth offenses are robberies involving the forceful taking of another’s money,” and that the district court’s conclusion that “a bank robbery and the robbery of a person are dissimilar offenses was premised on a distinction whose impact would be lost on a jury.” Appellant therefore

contends that this factor should have weighed against the impeachment evidence. There is merit to appellant's contention. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) ("The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely for impeachment purposes.").

As to the fourth and fifth factors, the district court reasoned that appellant was able to "put on a defense without testifying" and that if appellant did testify, his credibility would be "central" to the jury's resolution of the facts of the case. Although appellant contends that his testimony was "essential" and that it was "the only way for the jury to hear [his] explanation of how a baseball hat in [J.S.'s] possession had [appellant's] DNA on it," appellant did not make an offer of proof explaining what additional information his testimony would have provided. Appellant's general explanation that his testimony would have established that he and J.S. knew each other does not explain how appellant's hat came to be in J.S.'s truck on the night of the robbery. Absent an offer of proof regarding the substance of appellant's proposed testimony, appellant's arguments regarding the importance of his testimony are not persuasive. *See State v. Lloyd*, 345 N.W.2d 240, 246 (Minn. 1984) ("Significantly, defendant made no offer of proof to show what . . . he would testify about that was not already before the jury.") Moreover, any testimony that appellant and J.S. knew each other would have contradicted appellant's prior statement to police in which he stated that he did not know J.S.

In conclusion, although we disagree that the third factor weighed in favor of the impeachment evidence, the remaining four factors weighed in favor of permitting the

state to impeach appellant with his prior felony conviction. We also observe that any potential prejudice would have been mitigated by appellant's impeachment of J.S. and one of the state's witnesses with their prior convictions. *See State v. Hochstein*, 623 N.W.2d 617, 624 (Minn. App. 2001) (noting that any prejudice that the defendant may have suffered in being impeached with a prior conviction was mitigated by his impeachment of a state witness with her prior convictions). In sum, the district court did not abuse its discretion in ruling that the state could impeach appellant with his prior conviction.

## II.

Appellant argues that the district court committed a "structural error requiring reversal" when it accepted his stipulation to an element of the prohibited-person offense without first obtaining a jury-trial waiver from appellant. "A criminal defendant has a right to a jury trial that includes the right to a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011) (quotation and citation omitted). Whether a defendant has been denied his right to a jury trial is a question of law, which this court reviews de novo. *Id.* at 848-49.

A defendant must personally waive his or her right to a jury trial on stipulated elements, and the district court's failure to obtain that waiver constitutes error. *Id.* at 850. But the supreme court recently held that the failure to obtain a jury-trial waiver in this instance does not amount to a structural error requiring automatic reversal. *Id.* at 851-52. In so holding, the supreme court found it significant that the defendant did not argue any

defect in the trial mechanism or framework, but instead argued only an “error in the process or procedure the [district] court used when it accepted the stipulation.” *Id.* at 852. The supreme court concluded that this failure fell into the category of “trial errors” and that the defendant’s failure to object to the error meant that it should be reviewed for plain error. *Id.*

The same analysis applies in this case. Appellant stipulated to the fact that he had a prior felony offense, making him ineligible to possess a firearm. But appellant did not personally waive the right to a jury trial on that element. The district court’s failure to obtain a personal jury-trial waiver on that essential element of the charge constitutes error. But because appellant did not object at trial, this court reviews the district court’s failure to obtain a waiver for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

“The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights.” *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). “If those three prongs are met, [an appellate court] may correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* (quotation omitted). We need not address the first two prongs of the plain-error analysis if the third prong is dispositive. *See State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006) (“If any prong of the test is not met, the claim fails.”).

Here, we conclude that any error in failing to obtain a jury-trial waiver did not affect appellant’s substantial rights. Appellant’s stipulation protected him from the possibility that the jury would improperly use his previous conviction as improper

character evidence. Moreover, appellant does not challenge the existence of the prior conviction and makes no argument on appeal as to how the stipulation affected his substantial rights. Because the assigned error did not affect appellant's substantial rights, he is not entitled to a new trial on this basis.

### III.

Appellant argues that the district court improperly calculated his criminal-history score and that his sentence is unlawful. The state has the burden of establishing a defendant's criminal-history score. *Bolstad v. State*, 439 N.W.2d 50, 53 (Minn. App. 1989). Although appellant did not raise this issue in district court, criminal defendants have an unwaivable right to appeal a criminal-history score regardless of whether they raised the issue below. *State v. Maurstad*, 733 N.W.2d 141, 146-47 (Minn. 2007). A sentence based on a miscalculated criminal-history score is unlawful and may be corrected at any time. *Id.* at 147; *see also* Minn. R. Crim. P. 27.03, subd. 9.

Appellant contends that his federal convictions were improperly weighted when determining his criminal-history score. The district court sentenced appellant using a criminal-history score that included one criminal-history point for his July 1998 federal bank-robbery conviction and one and one-half points for his July 1998 federal use-of-a-firearm-during-a-bank-robbery conviction. Appellant argues that “[b]ecause both convictions arise from the same behavioral incident and would have resulted in only one conviction under Minnesota law, [he] was sentenced with an improperly calculated criminal history score.”

When determining the weight given to prior, out-of-jurisdiction convictions, the sentencing court is to determine “how the offender would have been sentenced had the offense occurred in Minnesota at the time of the current offense.” *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). The state concedes that the sentencing court should have determined “how [a]ppellant would have been sentenced in Minnesota at the time of the current offenses” and that the case should be remanded for a determination of this issue.

Because appellant did not challenge his criminal-history score in district court, the district court made no findings regarding how appellant’s federal convictions would have been sentenced in Minnesota. And because proper analysis of the sentencing issue requires fact-finding, the analysis should be conducted in the first instance in district court. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (stating that the role of appellate courts is to correct errors, not to find facts); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (“The function of the court of appeals is limited to identifying errors and then correcting them.”). We therefore reverse appellant’s sentence and remand for resentencing.

#### IV.

Appellant raises two additional arguments in his pro se supplemental brief. He argues that the photo lineup that resulted in his identification was impermissibly suggestive and that the evidence was insufficient to sustain his convictions.

##### *Photo Lineup*

Appellant argues that “the third photographic lineup was unnecessarily suggestive and fails because the identification was unreliable under the totality of the

circumstances.” The admission of pretrial identification evidence, such as a photographic lineup, raises due-process concerns if the identification procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). “[D]espite the district court’s general discretion to make evidentiary decisions, we review de novo whether a defendant has been denied due process.” *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). But issues not raised in the district court are waived, including issues raising constitutional concerns. *See State v. Roby*, 463 N.W.2d 506, 510 (Minn. 1990) (refusing to address a due-process issue that was not properly raised in the district court). Appellant did not challenge the constitutionality of the identification procedure in district court, nor did appellant object to the admission of the photographic lineup at trial. We therefore decline to address his argument on this issue.

#### *Sufficiency of the Evidence*

Appellant contends that the evidence is insufficient to support his convictions. In considering a claim of insufficient evidence, this court’s review “is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction,” is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably

conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

As to his prohibited-person-in-possession-of-a-firearm conviction, appellant argues that “[i]t is clear that [his] conviction was based solely on circumstantial evidence.” Appellant argues that his aggravated-robbery and kidnapping convictions were based “on mostly circumstantial evidence.” The record belies appellant’s arguments. The state presented direct evidence of appellant’s guilt: J.S. testified that appellant approached him at a gas station, pointed a gun at him, took money and other personal items from him, forced him into his truck, and drove J.S. to a different location. The evidence also established that a hat containing appellant’s DNA was discovered in J.S.’s truck and that J.S. saw appellant wearing that hat during the incident. Moreover, J.S. identified appellant in a lineup and in court as one of the individuals who robbed him. The state also called a witness who testified that he spoke with appellant while the two were in jail and that appellant confessed to the aggravated robbery and kidnapping. Assuming, as this court must, that the jury believed the state’s evidence and disbelieved all evidence to the contrary, the evidence is sufficient to support appellant’s convictions of aggravated robbery, kidnapping, and prohibited person in possession of a firearm beyond a reasonable doubt.

**Affirmed in part, reversed in part, and remanded.**