STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0632

State of Minnesota,
Respondent,

vs.

Matthew Douglas Paulson,
Appellant.

Filed March 27, 2023
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Anoka County District Court
File No. 02-CR-21-1789

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

Brad Johnson, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his kidnapping conviction, arguing that the district court should not have exercised jurisdiction over the charge and that his guilty plea was inaccurate because the underlying factual basis did not address venue. Appellant also

challenges his sentence, arguing that the district court erred by including two out-of-state convictions in his criminal-history score. We affirm appellant's conviction. But we reverse appellant's sentence and remand for recalculation of his criminal-history score.

FACTS

In April 2021, respondent State of Minnesota charged appellant Matthew Douglas Paulson in Anoka County with first- and second-degree criminal sexual conduct, alleging that Paulson sexually assaulted SW, a 15-year-old girl.

According to the complaint, on March 18, 2021, an officer stopped a vehicle driven by AG in Anoka County. SW was a passenger. Law enforcement discovered methamphetamine in the vehicle and suspected that SW was "extremely under the influence of methamphetamine." AG told law enforcement that on March 16, Paulson assaulted her at a residence in Wisconsin and then left with SW. SW told law enforcement that Paulson drove her to a wooded property in "Stacy" and that they stayed there for three days. It was later determined that the property was in Stacy, Minnesota. SW stated that Paulson provided her with methamphetamine and sexually assaulted her. AG stated that she located SW at the property, took SW from Paulson, and drove away. The complaint stated that SW resides with her mother, AB, in Anoka County and that, pursuant to Minn. Stat. § 627.15 (2020), SW was "found" in Anoka County "for purposes of jurisdiction."

Paulson moved to dismiss the charges for lack of jurisdiction. He argued that "the alleged crime[s] took place in Stacy, Minnesota," which "is not in Anoka [C]ounty." The district court held a contested omnibus hearing on Paulson's motion. The parties stipulated to the fact that the alleged offenses occurred in Stacy, Minnesota, which is in Isanti County.

The state introduced a police report and a medical record and argued that SW was "found" in Anoka County. Paulson called two witnesses to testify. HD testified that she previously was friends with SW, that SW was a runaway and a drug user, and that SW did not reside in Anoka County at the time of the offenses. AG likewise testified that SW was a runaway and resided in Wisconsin at the time of the offenses. AG testified that when she was stopped with SW in Anoka County, she was on her way to Chisago County.

The district court denied Paulson's motion to dismiss, reasoning that SW had been "found" in Anoka County and that venue was therefore proper in Anoka County. The state later amended the complaint to include three counts of kidnapping to facilitate a felony or flight.

Paulson and the state reached a plea agreement resolving "seven different cases."[1] As to the underlying sexual-assault and kidnapping charges involving SW, Paulson pleaded guilty to one count of kidnapping to facilitate a felony, specifically, to facilitate a second-degree controlled-substance crime. In exchange, the state agreed to concurrent sentencing, to sentencing in chronological order, and, based on an anticipated criminal-history score of three, to a prison term of between 78 and 93 months for the kidnapping charge, which would be sentenced last.

The ensuing presentence investigation report (PSI) assigned Paulson one-half of a criminal-history point for a Wisconsin marijuana conviction and one-half of a criminal-

[1] Paulson pleaded guilty to second-degree controlled-substance possession in court file number 02-CR-20-2247, to third-degree assault in court file number 02-CR-21-1243, and to threats-of-violence in court file number 02-CR-20-5432.

history point for an Iowa marijuana conviction. Paulson's criminal-history score, for purposes of sentencing the kidnapping conviction, was determined to be five, and not three as anticipated, and the PSI recommended a presumptive prison sentence of 98 months (range of 84-117). The district court sentenced Paulson to an executed term of 93 months in prison for the kidnapping offense.[2]

Paulson appeals.

DECISION

I.

Paulson contends that the "Anoka County District Court could not exercise subject matter jurisdiction over the kidnaping charge" because he "engaged in no criminal behavior relevant to the charge in Anoka County and no operative event occurred in Anoka County." He argues that just because "some court in Minnesota would have had jurisdiction over the charge does not mean that Anoka County District Court could exercise jurisdiction." Paulson's argument raises issues of both jurisdiction and venue. We address each issue in turn.

Jurisdiction

"[J]urisdiction is the power to hear and decide disputes," or stated differently, "it is the authority to apply the law to the acts of men." *State v. Smith*, 421 N.W.2d 315, 318 (Minn. 1988) (quotation omitted). "The district court has original jurisdiction in all civil

[2] The district court imposed concurrent sentences of 58 months for the controlled-substance offense, 21 months for the third-degree assault offense, and 24 months for the threats-of-violence offense.

and criminal cases." Minn. Const. art. VI, § 3. However, "jurisdiction can exist only in those places where the crime was committed." *Smith*, 421 N.W.2d at 318. It is "universally accepted that one [s]tate or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or [offenses] committed in and against another [s]tate or sovereignty." *Id.* (quotation omitted). "[S]ome operative event, a triggering event if you will, must occur within the jurisdiction for the court to have power to act." *Id.* at 319. An appellate court reviews jurisdictional issues de novo. *State v. Simion*, 745 N.W.2d 830, 837 (Minn. 2008).

Consistent with that principle, Minn. Stat. § 609.025 (2022) provides that a person may be convicted and sentenced in Minnesota if the person commits an offense in whole or in part within this state. The statute "requires that some territorial event be committed in Minnesota to confer jurisdiction." *Smith*, 421 N.W.2d at 319-20.

The district courts of Minnesota have jurisdiction to punish a crime "[o]nly if some part of the crime was committed within the State of Minnesota." *Id.* at 320. However, "[t]he jurisdiction of a district court of the State of Minnesota is not limited to any particular county but extends throughout the state." *State v. Loveless*, 425 N.W.2d 602, 603 (Minn. App. 1988), *rev. denied* (Minn. Aug. 31, 1988). As this court explained in *Loveless*,

> Before the passage of 1982 Minn. Laws, ch. 398, the function and power of the district court were much different from what they are today. Prior to the merger of the trial bench into one court, there was separate jurisdiction for county (which included juvenile) and district courts. As a result of the merger, the county courts are now integrated into the district

> courts. As such, an order from one district court is effective throughout all of Minnesota.[3]

Id.

In sum, the State of Minnesota, and not any particular judicial district, is the relevant "territory" when determining whether a district court has jurisdiction over criminal charges. And because a district court's jurisdiction extends throughout the state, the court has jurisdiction to hear any case that falls within the jurisdictional grant of section 609.025. It is undisputed that part of the charged offense in this case occurred in Minnesota. Thus, the district courts of Minnesota had jurisdiction to hear and decide the case. *See* Minn. Const. art. VI, § 3; *Simion*, 745 N.W.2d at 834 (holding that "because an operative event of the theft charge was committed in Minnesota, the court had jurisdiction over the theft charge").

Paulson cites *State v. Robinson* to avoid the conclusion that Anoka County District Court had jurisdiction over the underlying case. 14 Minn. 447, 14 Gil. 333 (1869). He quotes the first clause of a sentence in that opinion as follows: "It is true, as a general rule, that for the purpose of showing jurisdiction an indictment for a crime must allege that the offen[se] was committed *in the county* in which the indictment is found." *Id*. at 450, 14 Gil. at 334 (emphasis added). But an exception to that rule, which is set forth in the second clause of the quoted sentence, provides that "the rule is only applicable where the

[3] Minnesota has ten judicial districts. *See* Minn. Judicial Branch, Find Your Court, https://www.mncourts.gov/find-courts.aspx [https://perma.cc/A98D-G7R6]. Two of those districts are coextensive with single counties: the second judicial district is coextensive with Ramsey County and the fourth judicial district is coextensive with Hennepin County. *Id.* The remaining judicial districts include more than one county. *Id.*

jurisdiction of the court in which the offen[se] is prosecuted is limited to the local boundaries of the county." *Id*. Because the jurisdiction of a district court of the State of Minnesota is not limited to any particular county and extends throughout the state, the *Robinson* rule is inapplicable here.

Paulson's remaining arguments that Anoka County District Court could not exercise jurisdiction over the kidnaping charge are based on the doctrine of venue. We therefore turn to that issue.

Venue

Venue is a trial right rooted in the Minnesota Constitution, which provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a *speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed*, which county or district shall have been previously ascertained by law." Minn. Const. art. VI, § 6 (emphasis added). A Minnesota statute similarly provides that "every criminal cause shall be *tried* in the county where the offense was committed," except as otherwise provided in the Minnesota Rules of Criminal Procedure. Minn. Stat. § 627.01, subd. 1 (2022) (emphasis added). An appellate court reviews venue issues de novo. *State v. Daniels*, 765 N.W.2d 645, 648-49 (Minn. App. 2009), *rev. denied* (Minn. Aug. 11, 2009).

The doctrines of jurisdiction and venue are "distinct." *State v. Eibensteiner*, 690 N.W.2d 140, 148 (Minn. App. 2004), *rev. denied* (Minn. Mar. 15, 2005). "Jurisdiction is a threshold inquiry that must be established before the question of venue is reached." *Smith*, 421 N.W.2d at 320. Unlike jurisdiction, which concerns a court's power to hear and decide a case, "venue is a very different issue that requires different considerations."

Smith, 421 N.W.2d at 320. "[V]enue deals with convenience and location of trial," and not with "the power of the court to hear the action in the first place." *Id.* Thus, "[v]enue cannot determine jurisdiction." *Eibensteiner*, 690 N.W.2d at 149.

Simply put: "[a]rticle I, [s]ection 6, does not define or limit the jurisdiction of the courts of this state over criminal offenses."[4] *State v. Fitch*, 884 N.W.2d 367, 374 (Minn. 2016) (quotation omitted). Thus, Paulson's contention that his charges were improperly resolved in the Anoka County District Court because the alleged offenses did not occur in Anoka County raises a venue issue, and not a jurisdictional issue.

"Article I, [s]ection 6 does not expressly, or in effect, guaranty to the accused in all cases a trial in the county in which the offense was committed." *Fitch*, 884 N.W.2d at 374 (quotation omitted). Instead, the constitutional provision "defines and limits the locality from which a jury shall be taken for the trial of [a] defendant in a criminal prosecution." *Id*. (quotation omitted).

> Thus, the language of [a]rticle I, [s]ection 6, and the weight of our precedent reveal that a criminal defendant has the right to be tried by an impartial jury drawn from the county in which the alleged offense occurred. *This right guarantees the defendant only a jury from a particular county or district, not a judge or prosecuting authority from that county or district*.

[4] The same rule applies in civil cases. *See Claseman v. Feeney*, 300 N.W. 818, 819 (Minn. 1941) (stating that improper venue in a civil case is not a jurisdictional defect); *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 504 (Minn. App. 2007) (stating that venue is not jurisdictional), *rev. denied* (Minn. Feb. 28, 2007).

Id. at 375 (emphasis added). Thus, a defendant's rights under article I, section 6, cannot be violated "until a jury from a county other than the one in which the alleged offense occurred was impaneled to adjudicate the case against him." *Id*. at 374.

The venue challenge in this case arises in the context of a guilty plea. We are not aware of, and our research does not reveal, any precedential case addressing a venue challenge in that context. Instead, the precedential caselaw examines venue challenges in the trial context. *See, e.g.*, *Fitch*, 884 N.W.2d at 373 (venue challenge in jury-trial context); *State v. Krejci*, 458 N.W.2d 407, 409 (Minn. 1990) (venue challenge in court-trial context); *State v. Trezona*, 176 N.W.2d 95, 96 (Minn. 1970) (venue challenge in court-trial context); *State v. Johnson*, 979 N.W.2d 483, 498 (Minn. App. 2022) (venue challenge in jury-trial context), *rev. granted* (Minn. Nov. 23, 2022); *State v. Pierce*, 792 N.W.2d 83, 84 (Minn. App. 2010) (venue challenge in court-trial context); *Daniels*, 765 N.W.2d at 647 (venue challenge in "*Lothenbach* trial" context); *State v. Larsen*, 442 N.W.2d 840, 842 (Minn. App. 1989) (venue challenge in jury-trial context); *see also Eibensteiner*, 690 N.W.2d at 144 (venue challenge in grand-jury context).

However, this court has held, in a nonprecedential opinion, that a defendant waives a venue challenge by pleading guilty.[5] *Rosillo v. State*, No. A10-1864, 2011 WL 3903183, at *1 (Minn. App. 2011). We relied on *State v. Ford*, which states that "[a] guilty plea by a counseled defendant has traditionally operated, in Minnesota and in other jurisdictions,

[5] We note that a waiver rule applies in civil cases. *See In re Kowalke's Guardianship*, 46 N.W.2d 275, 284 (Minn. 1950) (stating that defective venue can be waived by failing to object or by seeking affirmative relief in the allegedly improper venue).

as a waiver of all non-jurisdictional defects arising prior to the entry of the plea." 397 N.W.2d 875, 878 (Minn. 1986); *see State v. Cruz Montanez*, 940 N.W.2d 162, 163 (Minn. 2020) (declining to consider issue based on the "longstanding rule" that "a criminal defendant's valid guilty plea waives all non-jurisdictional defects arising prior to the entry of the plea"); *Dikken v. State*, 896 N.W.2d 873, 878 (Minn. 2017) (applying the rule that "only jurisdictional challenges may be entertained after a criminal defendant has pleaded guilty").

Once again, "[v]enue cannot determine jurisdiction." *Eibensteiner*, 690 N.W.2d at 149. And "[a]rticle I, [s]ection 6, does not define or limit the jurisdiction of the courts of this state over criminal offenses." *Fitch*, 884 N.W.2d at 374. Because venue is non-jurisdictional and a valid guilty plea waives all non-jurisdictional defects, a valid guilty plea results in waiver of any venue challenge. We therefore decline to address Paulson's challenge to the validity of his guilty plea.

II.

Paulson contends that his guilty plea was inaccurate and therefore invalid.[6] For a guilty plea to be valid, it must be accurate, voluntary, and intelligent. *Brown v. State*, 449

[6] Paulson also contends that the district court plainly erred by finding probable cause for the kidnapping offense because the state did not allege facts that would have proved the venue element of the kidnapping offense. Although Paulson moved to dismiss the criminal-sexual-conduct charges for lack of proper venue, he did not assert a probable-cause challenge after the kidnapping charges were added. We do not address Paulson's probable-cause challenge for three reasons. First, once a defendant has been found guilty, a pretrial probable-cause challenge is immaterial because "[t]he standard for the sufficiency of the evidence to support a conviction is much higher than probable cause." *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *rev. denied* (Minn. Mar. 21, 1995). Second, by pleading guilty, Paulson waived the non-jurisdictional probable-cause

N.W.2d 180, 182 (Minn. 1989). A defendant bears the burden of showing his plea was invalid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "Assessing the validity of a plea presents a question of law that [appellate courts] review de novo." *Id.*

"A proper factual basis must be established for a guilty plea to be accurate." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotations omitted). "The main purpose of the accuracy requirement is to protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983).

Paulson's challenge to the accuracy of his plea is based solely on the "venue element." He argues that "[t]here was no factual basis establishing the venue element for [his] plea" and that the district court therefore erred by accepting "the inaccurate plea."

Caselaw states that "[v]enue is an element" of an offense that "must be proved beyond a reasonable doubt" at trial. *Larsen*, 442 N.W.2d at 842. The "venue determination relating to where a trial may be held . . . is distinct from venue as an element of the offense, which, like all other elements, must be established by probable cause to support an indictment and by proof beyond a reasonable doubt to support a conviction." *Eibensteiner*,

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challenge. And third, Paulson expressly waived a probable-cause challenge, as shown by his petition to plead guilty, which states, "I know that I could now move that the complaint against me be dismissed for lack of probable cause and I know that if I do not make such a motion and go ahead with entering my plea of guilty, I waive all right to successfully object to the absence of a probable cause hearing."

690 N.W.2d at 150; *see State v. Huisman*, 944 N.W.2d 464, 468 (Minn. 2020) (treating location of offense as an element of charged offense when determining whether defense counsel conceded guilt at a court trial); *Trezona*, 176 N.W.2d at 96 (treating venue as an element of a charged offense and deciding whether the state adequately proved venue at a court trial). Although objections to improper venue are deemed waived if a defendant does not object to the venue before trial, "[s]uch wavier . . . does not relieve the state of its burden of proving venue." *State v. Blooflat*, 524 N.W.2d 482, 484 (Minn. App. 1994).

Minnesota Supreme Court caselaw treating venue as an offense "element" predates the passage of the 1982 law merging the Minnesota trial bench into one court, which extended the jurisdiction of the district courts throughout the state. *Loveless*, 425 N.W.2d at 603. Prior to the merger, "there was separate jurisdiction for the county . . . and district courts." *Id.* We question whether it is appropriate to treat venue as an element of a charged offense now that the Minnesota district courts have statewide jurisdiction. Indeed, a more recent, post-merger, case from the Minnesota Supreme Court, *State v. Ali*, suggests reason to question the pre-merger approach of treating venue as an offense element. 806 N.W.2d 45 (Minn. 2011).

In *Ali*, the Minnesota Supreme Court considered "the appropriate evidentiary standard to be applied to the question of a defendant's age on the date of the alleged offense," for purpose of determining jurisdiction. *Id.* at 46. The *Ali* defendant was a juvenile and his age at the time of the offense determined whether he was automatically subject to prosecution under the laws governing proceedings in adult criminal court, instead of in juvenile court. *Id.* The defendant argued that "establishing his age is an element of

the offenses of which he has been charged," that "jurisdiction is 'no less indispensable to a conviction than is a fact establishing venue,'" and that "because the court of appeals has required that venue be proven by the prosecution beyond a reasonable doubt," the beyond-a-reasonable-doubt standard should apply to jurisdictional determinations as well. *Id.* at 52.

The supreme court rejected that argument and held that the state need only prove the defendant's age by a preponderance of the evidence. *Id.* at 46. The supreme court reasoned that:

> A defendant's age is not an element of either first-degree premeditated murder or first-degree felony murder, the two charges for which Ali was indicted. *See* Minn. Stat. §§ 609.185(a)(1), (a)(3). Rather, the question of age determines only whether the juvenile or district court has jurisdiction over the proceedings. *See* Minn. Stat. § 260B.101, subd. 2. This is a separate issue from that of guilt or innocence, and *nothing in Minnesota Statutes or our case law requires that either the question of age or the issue of jurisdiction of the [district] court be proven beyond a reasonable doubt*.

Id. at 52-53 (emphasis added).

The same could be said in this case. Location is not an element of the statutory kidnapping offense to which Paulson pleaded guilty. *See* Minn. Stat. § 609.25, subd. 1(2) (2020). Section 609.25, subdivision 1(2), describes the elements of the offense in terms of the acts necessary to constitute the offense, whereas the constitutional venue provision regards the proper location for a trial, if a trial were to occur. Under the supreme court's reasoning in *Ali*, the proper location for trial "is a separate issue from that of guilt or innocence." 806 N.W.2d at 52. Thus, venue is not an "element" of the charged offense in

the sense that it determined whether or not Paulson committed the offense. Instead, venue concerns solely the trial location and ensures the constitutional right to a trial by "an impartial jury of the county or district wherein the crime shall have been committed." Minn. Const. art. VI, § 6.

Because venue is a constitutional jury-trial right, we do not discern a need for the district court to determine, when accepting a guilty plea, whether venue would have been proper if the defendant had not waived his right to trial. More importantly, we do not discern how failure to establish venue when proffering a factual basis for a guilty plea implicates the purpose of the accuracy requirement, which is to "protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial." *Trott*, 338 N.W.2d at 251. Indeed, Paulson does not contest that the record establishes the statutory elements of the kidnapping offense, that is, his commission of the acts necessary to constitute the offense as defined in statute. Thus, we have no concern that Paulson pleaded guilty to a more serious offense than he could have been convicted of if he had gone to trial. We therefore hold that Paulson's guilty plea was accurate even though the factual basis for his plea did not address venue.

In sum, Paulson has not established that his guilty plea was inaccurate and therefore invalid. As a result of that valid guilty plea, his non-jurisdictional challenge to venue has been waived.[7]

[7] Because Paulson's venue challenge is deemed waived, we do not address the parties' arguments regarding whether venue was proper under Minn. Stat. § 627.15, which states that "[a] criminal action arising out of an incident of alleged child abuse may be prosecuted either in the county where the alleged abuse occurred or the county where the child is

III.

Paulson contends that his sentence was illegal, arguing that the district court erred by assigning him one-half of a criminal-history point for a marijuana conviction from Wisconsin and one-half of a criminal-history point for a marijuana conviction from Iowa.

"The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable [sentencing guidelines] [g]rid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis)." Minn. Sent'g Guidelines 2.C.1 (2020). "The sentences provided in the [g]rids are presumed to be appropriate for the crimes to which they apply." Minn. Sent'g Guidelines 2.D.1 (2020). Sentencing pursuant to the sentencing guidelines "is a procedure based on state public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing." Minn. Stat. § 244.09, subd. 5 (2022).

"[S]entences must be based on correct criminal history scores, as these scores are the mechanism district courts use to ensure that defendants with similar criminal histories receive approximately equal sanctions for the same offense." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). A defendant can neither waive nor forfeit appellate review

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found." However, we note that the complaint indicates that SW resided in Anoka County with her mother at the time of the offense and that this court has held that "[f]or the purposes of the venue statute for criminal prosecution of child abuse, a child may be 'found' and an action may be prosecuted in the county where the child resides." *State v. Larson*, 520 N.W.2d 456, 458 (Minn. App. 1994), *rev. denied* (Minn. Oct. 14, 1994); *see also State v. Rucker*, 752 N.W.2d 538, 542 (Minn. App. 2008) (holding that for the purpose of establishing venue in the limited area of child abuse, a child can be "found" in the county where the child resided either when the abuse occurred or when the abuse was discovered), *rev. denied* (Minn. Sept. 23, 2008).

of his criminal-history score "because a sentence based on an incorrect criminal history score is an illegal sentence." *Id.*; *see also* Minn. R. Crim. P. 27.03, subd. 9 ("The court may at any time correct a sentence not authorized by law."). "[A] defendant's right to appeal an illegal sentence cannot be waived." *State v. Maley*, 714 N.W.2d 708, 714 (Minn. App. 2006).

When computing an offender's criminal-history score, "the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense . . . before the current sentencing." Minn. Sent'g Guidelines cmt. 2.B.101 (2020). Convictions from other jurisdictions must be considered in calculating an offender's criminal-history score. Minn. Sent'g Guidelines 2.B.5.a (2020); *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). A non-Minnesota conviction "may be counted as a felony [in a criminal-history score] only if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent'g Guidelines 2.B.5.b (2020) (emphasis omitted).

"[T]he sentencing court should compare the definition of the foreign offense with the definitions of comparable Minnesota offenses but also may consider the nature of the foreign offense and the sentence received." *Hill v. State*, 483 N.W.2d 57, 58 (Minn. 1992). It would "be unfair to those defendants receiving criminal history points for prior Minnesota convictions if their counterparts with prior foreign or out-of-state convictions of similar offenses for the same basic conduct did not receive criminal history points for those offenses." *Id.* at 61.

The state must "show that a prior conviction qualifies for inclusion within the criminal-history score" and that the criminal-history score is calculated correctly. *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." *Maley*, 714 N.W.2d at 711. We review a district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Morgan*, 953 N.W.2d 729, 732 (Minn. App. 2020), *aff'd*, 968 N.W.2d 25 (Minn. 2021).

Paulson argues that the Wisconsin and Iowa offenses "are not equivalent to any Minnesota felony offense" and that "the state did not submit evidence that would prove that [his] conduct would have been a felony in Minnesota." The district court assigned Paulson one-half of a criminal-history point for his conviction under Wis. Stat. § 961.41, subd. 1(h)(1) (2010),[8] which was deemed "equivalent to" a conviction of fifth-degree sale of a controlled substance in Minnesota under Minn. Stat. § 152.025, subd. 1(1) (2020). Under Wis. Stat. § 961.41, subd. 1(h)(1), it is a felony for "any person to manufacture, distribute or deliver a controlled substance or controlled substance analog," including "[t]wo hundred grams or less, or 4 or fewer plants containing tetrahydrocannabinols." The PSI stated, "According to Wisconsin [c]ourt records[,] [Paulson] was involved in the sale of 34.31 grams of marijuana."

[8] Though no specific year for the statute was given, the offense date was listed as April 2011.

Under Minn. Stat. § 152.025, subd. 1(1), "[a] person is guilty of a controlled substance crime in the fifth degree" in Minnesota if "the person unlawfully sells one or more mixtures containing marijuana . . . except a small amount of marijuana for no remuneration." A "small amount of marijuana" is defined by statute as "42.5 grams or less." Minn. Stat. § 152.01, subd. 16 (2020). Because Paulson was accused of selling 34.31 grams of marijuana in Wisconsin, if there was no remuneration, the "sale" would not be defined as a fifth-degree sale in Minnesota.

The district court also assigned Paulson one-half of a criminal-history point for his conviction under Iowa Code § 124.401, subd. 1(d) (2014)[9] and Iowa Code § 124.204, subd. 4(m) (2014), which make it a felony for "any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance," including "fifty kilograms or less of marijuana." The PSI stated that this conviction was "equivalent" to a conviction under Minn. Stat. § 152.025, subd. 2(1) (2020), for fifth-degree possession of a controlled substance. The PSI further stated, "According to Iowa [Department of Corrections] records, [Paulson] was in possession of approximately one pound (0.45 kg) of marijuana."

Under Minn. Stat. § 152.025, subd. 2(1), "[a] person is guilty of controlled substance crime in the fifth degree" in Minnesota if "the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana." Marijuana is a "Schedule I" drug in Minnesota. Minn. Stat.

[9] Though no specific year for the statute was given, the offense date was listed as April 2015.

§ 152.02, subd. 2(h) (2020). Again, a "small amount of marijuana" is defined by statute as "42.5 grams or less." Minn. Stat. § 152.01, subd. 16. If Paulson possessed 0.45 kilograms, or 450 grams, Minnesota's small-amount exception is inapplicable.

Paulson notes that the "out-of-state offenses criminalize a broader range of behavior than Minnesota's controlled[-]substance laws, such that conduct that would be felonious in Wisconsin and Iowa is a petty misdemeanor in Minnesota." He argues that "a defendant *categorically* cannot be assigned points for convictions under the statutes [he] was convicted of violating, regardless of what conduct the defendant engaged in in those states." (Emphasis added.) Paulson argues for application of a "categorical approach" and asks this court to focus only on the elements of the out-of-state convictions and the analogous Minnesota crimes, and to ignore the particular facts of the out-of-state cases. The state counters that this court should use a "modified categorical approach" because Iowa's and Wisconsin's statutory drug schemes are "divisible." The state asks us to look to underlying documents or facts to determine the exact offenses of which Paulson was convicted.

The "categorical" and "modified categorical" approaches to sentencing are explained in *Mathis v. United States*, 136 S. Ct. 2243 (2016). Under the categorical approach, a sentencing court focuses "solely on whether the elements of the crime of conviction sufficiently match the elements of [the out-of-state] conviction, while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248. Under the modified categorical approach, "a sentencing court looks to a limited class of documents (for example, the

indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* at 2249.

Mathis involved application of the Armed Career Criminal Act (ACCA), which imposes a 15-year mandatory minimum sentence on certain federal defendants who have three prior convictions for a "violent felony." *Id.* at 2247. The Supreme Court stated that application of the ACCA involves only "comparing elements." *Id.* at 2257. "Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition." *Id*. "The prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Id.* at 2247.

The *Mathis* court provided three justifications for that rule, including that "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Id.* at 2252; *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). "That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Mathis*, 136 S. Ct. at 2252. Paulson seizes on that justification, arguing that "constitutional rules . . . prohibit a court from *increasing a presumptive sentence* due to facts found by the court rather than admitted by the defendant or proved beyond a reasonable doubt to a jury." (Emphasis added.)

Paulson's reliance on *Mathis* and its application of the "categorical" approach is unavailing because *Mathis* involved use of a prior conviction to *enhance* a sentence under

the ACCA. Those are not the circumstances here. The Wisconsin and Iowa offenses were not used to enhance Paulson's presumptive sentence under the Minnesota Sentencing Guidelines. Instead, the out-of-state offenses were used to determine Paulson's criminal-history score, which in turn determined his *presumptive* sentence. Minn. Sent'g Guidelines 2 (2020) ("The presumptive sentence is found in the cell of the appropriate [g]rid located at the intersection of the criminal history score and the severity level."). Evaluating out-of-state convictions for possible inclusion in a defendant's criminal-history score when determining the presumptive sentence is very different from relying on a prior conviction to impose an enhanced sentence; only the latter implicates the constitutional right to a jury trial. *See, e.g.*, *State v. Henderson*, 706 N.W.2d 758, 758 (Minn. 2005) ("A determination that appellant's prior convictions formed a pattern of criminal conduct as required for *enhanced* sentencing . . . based on the district court's finding of a pattern of criminal conduct violated appellant's Sixth Amendment right to trial by jury." (emphasis added)).

In sum, the district court was not required to apply the "categorical" approach when determining whether Paulson's Wisconsin and Iowa convictions could be included in his criminal-history score for the purpose of determining his presumptive sentence. The district court could look beyond the elements of the relevant offenses and could consider the nature of the foreign offenses.[10] *See Hill*, 483 N.W.2d at 58 (stating that "the sentencing

[10] Although comments to the sentencing guidelines are not binding, they support this approach, providing that "[f]or prior non-Minnesota controlled substance convictions, the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense." Minn. Sent'g Guidelines cmt. 2.B.503 (2020); *see State v. Scovel*, 916 N.W.2d 550, 555 (Minn. 2018) (stating that the comments are merely advisory, not binding).

court should compare the definition of the foreign offense with the definitions of comparable Minnesota offenses but also may consider the nature of the foreign offense and the sentence received by the offender for the offense.").

To establish that inclusion of out-of-state convictions in a defendant's criminal-history score is appropriate, the state must provide evidence under Minn. R. Evid. 1005 that proves the validity of the conviction. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). In accordance with *Griffin* and rule 1005, the district court can "rely on persuasive evidence that sufficiently substitutes for the official, certified record of conviction." *Maley*, 714 N.W.2d at 712. For example, in *State v. Jackson*, the state provided sufficient evidence of an out-of-state conviction based only on the unsworn "advice and testimony" of a probation officer during sentencing. 358 N.W.2d 681, 683 (Minn. App. 1984). In contrast, the state did not meet its burden in *Maley* when it listed the out-of-state convictions on the sentencing worksheet but provided no documents or evidence admissible under rule 1005 to prove the convictions. 714 N.W.2d at 710, 712.

Here, the only evidence presented regarding Paulson's Wisconsin and Iowa convictions was the PSI. The state argues that the record is sufficient because the PSI referenced other documents that provided information regarding those convictions. For example, the PSI stated that "[a]ccording to Wisconsin [c]ourt records[,] [Paulson] was involved in the sale of 34.31 grams of marijuana" and that "[a]ccording to Iowa [Department of Corrections] records, [Paulson] was in possession of approximately one pound (0.45 kg) of marijuana." We conclude that this record is inadequate to justify inclusion of the Wisconsin and Iowa convictions as felonies in Paulson's criminal-history

score because the state did not submit the documents on which the PSI relied or call a probation officer to explain those documents. The state simply relied on the PSI alone, which was inadequate. *See id*.

We therefore reverse and remand Paulson's sentence for recalculation of his criminal-history score. Because Paulson did not object to the district court's determination that his out-of-state convictions were felonies, the state is "permitted to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008).

Affirmed in part, reversed in part, and remanded.