STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0465

State of Minnesota,
Respondent,

vs.

James Wesley Wilkes,
Appellant.

Filed February 18, 2014
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CR1223998

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of second-degree aggravated robbery and a 39-month sentence, appellant argues that his criminal history score improperly included a

2008 conviction for fifth-degree assault that had been sentenced as a petty misdemeanor, thereby resulting in a miscalculation of his criminal history score. Appellant also filed a pro se supplemental brief claiming that the evidence was insufficient to sustain his conviction. Because neither argument has merit, we affirm.

FACTS

Appellant James Wilkes was charged with second-degree aggravated robbery for allegedly using a gun to rob a cab driver. The complaint was later amended to include two counts of first-degree aggravated robbery.

At trial, L.C. testified that on July 25, 2012, he was sitting in his cab in front of a hotel waiting for fares when a group of people approached. According to L.C., a man who was carrying a "gray case or bag," approached the driver's side of his cab, "turned the bag upside down, stuck his hand in the bag, and said don't move, if [you] move I'll kill you." L.C. claimed that when the man put his hand in the bag, he grabbed the "butt of a gun" and demanded his cell phone.

L.C. testified that as he was being threatened by the gunman, several of the gunman's companions jumped inside the back of L.C.'s cab and started hitting him in the back of the head. The men took a cell phone, $60 cash, and a GPS device before fleeing the scene. Shortly thereafter, police stopped a man matching the description of the alleged gunman and identified him as appellant. L.C. was then transported to the area to participate in a show-up identification. L.C. "immediately" identified appellant as the gunman during the robbery, and L.C. later identified appellant in court as the man who robbed him at gunpoint.

The jury found appellant guilty of second-degree aggravated robbery, but not guilty of both counts of first-degree aggravated robbery. The district court sentenced appellant to 39 months in prison, which is the presumptive sentence for a defendant convicted of second-degree aggravated robbery with a criminal history score of three. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by sentencing him to 39 months in prison because his sentence is based on an erroneous calculation of his criminal history score. We review the district court's determination of a defendant's criminal history score for an abuse of discretion. *State v. Kjeseth*, 828 N.W.2d 480, 484 (Minn. App. 2013). But construction of the sentencing guidelines is a question of law that is reviewed de novo. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007).

A defendant's criminal history score is used by the district court to determine a defendant's presumptive sentence. *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). The Minnesota Sentencing Guidelines set forth the procedures by which the district court calculates a defendant's criminal history score. *Id.*; Minn. Sent. Guidelines 2.B. (Supp. 2012). Under the sentencing guidelines, a defendant's criminal history score is calculated by allocating points for each of the defendant's prior convictions for which a felony sentence was stayed or imposed. Minn. Sent. Guidelines 2.B.1. A defendant is also assigned one point if the defendant "was on probation . . . pending sentencing, following a . . . guilty verdict." *Id.* 2.B.2. The sentencing guidelines further assign one

unit for each misdemeanor and gross misdemeanor conviction. *Id.* 2.B.3. Four units are necessary to equal one criminal history point. *Id.* But in order to count towards a defendant's criminal history score, the gross misdemeanor and misdemeanor units must be "based on convictions which result in a misdemeanor or gross misdemeanor sentence." *State v. Ferdelman*, 358 N.W.2d 678, 679 (Minn. App. 1984); *see also* Minn. Sent. Guidelines 2.B.3.

"Convictions which are petty misdemeanors by statutory definition, or which have been certified as petty misdemeanors under Minn. R. Crim. P. 23.04, or which are deemed to be petty misdemeanors under Minn. R. Crim. P. 23.02, will not be used to compute the criminal history score." Minn. Sent. Guidelines cmt. 2.B.307 (Supp. 2012). A petty misdemeanor is defined as an "offense which is prohibited by statute, which does not constitute a crime and for which a sentence of a fine of not more than $300 may be imposed." Minn. Stat. § 609.02, subd. 4a (2010). "A conviction is deemed a petty misdemeanor if the sentence imposed is within petty misdemeanor limits." Minn. R. Crim. P. 23.02.

Here, in sentencing appellant, the district court determined that appellant had three criminal history points. Appellant received one custody-status point because he was on probation at the time of the second-degree aggravated robbery offense. He also received one felony point for a first-degree aggravated robbery conviction from 2008. Finally, appellant received one misdemeanor/gross-misdemeanor point. This was calculated by considering appellant's three prior misdemeanor convictions and one prior gross-misdemeanor conviction.

Appellant does not dispute the custody-status or felony points. Rather, appellant challenges his assignment of one criminal history point for his prior misdemeanor and gross-misdemeanor convictions because "based on the record it appears that" one of the qualifying misdemeanors—a fifth-degree assault from July 2008—was sentenced as a petty misdemeanor. To support his claim, appellant points to the PSI, which indicates that the disposition appellant received for the July 2008 fifth-degree assault was a suspended fine. Appellant contends that because it appears that the July 2008 fifth-degree assault "was sentenced as a petty misdemeanor, not a misdemeanor, . . . it should not have been assigned a unit for criminal history purposes." Appellant argues further that, if the fifth-degree assault is not included in his criminal history score, "then he only has three misdemeanor/gross misdemeanor units" and, therefore, only two criminal history points. Thus, appellant argues that the matter should be remanded for resentencing.

Appellant's argument is without merit. The record reflects that on July 21, 2008, appellant pleaded guilty to fifth-degree assault. The plea petition provides that the offense is a misdemeanor, and that pursuant to a plea agreement appellant would be sentenced to 30 days in jail with credit for 30-days time served. The record further reflects that after appellant entered his guilty plea to fifth-degree assault, the district court sentenced appellant to "30 days, credit 30 that [appellant has] already served." The sentence appellant received for the fifth-degree assault is a misdemeanor sentence. *See* Minn. Stat. § 609.02, subd. 3 (2010) (stating that a misdemeanor is defined as "a crime for which a sentence of not more than 90 days or a fine of not more than $1,000, or both,

may be imposed"). Therefore, the district court did not abuse its discretion by calculating appellant's criminal history score.

II.

Appellant filed a pro se supplemental brief arguing that the evidence was insufficient to sustain his conviction of second-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 2 (2010). When considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the 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). We assume that "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). And we 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).

Here, L.C. testified that (1) he was threatened by a man with a gun; (2) the man who threatened him was appellant; and (3) during the course of these events, he was robbed of his cell phone, a GPS device, and $60 cash. If believed, this testimony is sufficient to convict appellant of second-degree aggravated robbery. *See* Minn. Stat. § 609.245, subd. 2 (stating that "[w]hoever, while committing a robbery, implies, by word or act, possession of a dangerous weapon, is guilty of aggravated robbery"). The jury believed L.C.'s testimony, and we defer to the jury's credibility determinations. *See*

State v. Profit, 591 N.W.2d 451, 467 (Minn. 1999). Accordingly, sufficient evidence exists to support appellant's conviction of second-degree aggravated robbery.

Affirmed.