

NOT DESIGNATED FOR PUBLICATION

No. 126,158

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CALEB J. JEFFCOAT,
Appellant.

MEMORANDUM OPINION

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., GREEN and PICKERING, JJ.

PER CURIAM: Caleb Jeffcoat stands convicted of counterfeiting currency following a no contest plea and brings this appeal to allege, for the first time, that the sentence he received for that offense is illegal. Jeffcoat contends his prior federal conviction for bank robbery was erroneously classified as a person felony and thereby gave rise to a flawed criminal history score for use at sentencing in this case. An issue of this nature places the burden on Jeffcoat to bring forth a record which firmly establishes that prejudicial error occurred. He failed to do so and, as a result, we affirm the sentence imposed by the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Jeffcoat pled no contest to counterfeiting currency. At sentencing, all indications were that his criminal history score was a B as the result of two prior felony convictions, including the bank robbery conviction at issue in this appeal. Jeffcoat did not contest the accuracy of the score or otherwise object to its components. The parties offered a joint sentencing recommendation for a dispositional departure to probation, but the judge opted to follow the presumption instead and sentenced Jeffcoat to prison for 19 months.

The case now comes before us for an assessment of whether the criminal history score which guided the decision making at Jeffcoat's sentencing was accurate. In the event his prior federal conviction should have been classified as a nonperson felony, his criminal history score would drop from a B to a C, the presumption would shift from prison to probation, and he would be subject to a lower sentencing range for his underlying prison term.

LEGAL ANALYSIS

Defendant's Prior Federal Bank Robbery Conviction Was Properly Scored as a Person Felony.

The basic mechanics of the Kansas Sentencing Guidelines Act (KSGA) dictate that a district court arrives at a presumptive sentence for most felonies through a combination of the severity level of the current offense and the defendant's prior criminal history, which is assigned a score based upon the number of person and nonperson felonies the offender previously committed. *State v. Steinert*, 317 Kan. 342, 343, 529 P.3d 778 (2023) (citing K.S.A. 2022 Supp. 21-6804 and K.S.A. 2022 Supp. 21-6805). Another statute, K.S.A. 2022 Supp. 22-3504, governs the correction of illegal sentences, which are defined as those terms that (1) are imposed by a court without jurisdiction; (2) do not conform to the applicable statutory provisions, either in character or the term of

punishment; or (3) are ambiguous about the time and manner in which they are to be served. K.S.A. 2022 Supp. 22-3504(c)(1); *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022).

When a defendant argues that his or her criminal history score is wrong, rendering their sentence illegal, we are presented with a question of law over which we exercise unlimited review. *State v. Dawson*, 310 Kan. 112, 116, 444 P.3d 914 (2019). When the inquiry involves the proper classification of a prior conviction, as it does here, we are similarly tasked with analyzing a legal question and again exercise unlimited review in resolving the matter. *State v. Dickey*, 305 Kan. 217, 220, 380 P.3d 230 (2016). Although Jeffcoat did not raise his criminal history challenge before the district court, an illegal sentence can be corrected at any time. Thus, Jeffcoat is not prohibited from raising it for the first time on appeal. K.S.A. 2022 Supp. 22-3504(a); *Steinert*, 317 Kan. at 349 (holding that "a challenge to the classification of a prior conviction and the resulting criminal-history score could be raised for the first time on appeal because it presented an illegal-sentence claim"). However, at this phase, Jeffcoat bears the burden to prove the existence of the criminal history error he complains of. See *State v. Roberts*, 314 Kan. 316, 322, 498 P.3d 725 (2021).

A review of KSGA computation principles reveals that an offender's prior out-of-state convictions will be classified as a person crime if one or more of the following circumstances is present in the elements for that offense, as the offense is defined by the convicting jurisdiction:

"(a) Death or killing of any human being;

"(b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;

"(c) bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree;

"(d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance;

"(e) possessing, viewing, depicting, distributing, recording or transmitting an image of any person;

"(f) lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent;

"(g) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or

"(h) entering or remaining within any residence, dwelling or habitation." K.S.A. 2021 Supp. 21-6811(e)(3)(B)(i).

Additionally, an out-of-state felony must be assigned a person designation if its raw elements necessarily prove that a person was present during the commission of the offense. K.S.A. 2021 Supp. 21-6811(e)(3)(B)(ii). So, if the elements alone do not demand proof that a person was present at the time of the crime's commission, or otherwise *require* establishment of any of the circumstances set forth under K.S.A. 2021 Supp. 21-6811(e)(3)(B)(i), then the out-of-state felony must be classified as a nonperson felony. K.S.A. 2021 Supp. 21-6811(e)(3)(B)(iii). To be clear, the appropriate classification for an out-of-state felony turns on the *elements* of the offense, not the facts relied upon to establish its commission. See *State v. Busch*, 317 Kan. 308, 312, 528 P.3d 560 (2023).

Turning to the particular offense at issue here, Jeffcoat was previously convicted of bank robbery under 18 U.S.C. § 2113(a), which provides:

"Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined under this title or imprisoned not more than twenty years, or both."

Both parties attached documents to their briefs to help explain the nature of Jeffcoat's prior federal bank robbery conviction. In an effort to satisfy his burden to establish that prejudicial error occurred, Jeffcoat provided us with a copy of the judgment rendered by the United States District Court of the District of Kansas. That document reflects that Jeffcoat was convicted of bank robbery under 18 U.S.C. § 2113(a). The State submitted copies of the federal indictment along with the court's judgment, and also directs us to a press release from the U.S. Attorney's Office that was published following Jeffcoat's sentencing.

An offender who raises a challenge to his criminal history for the first time on appeal may provide the appellate court with journal entries of the challenged criminal history that were not originally attached to the criminal history worksheet. K.S.A. 2022 Supp. 21-6814(d). The State is permitted to do the same to establish a lack of prejudicial error. K.S.A. 2022 Supp. 21-6814(d). Therefore, it is well within our rights to consider the attached documents in resolving Jeffcoat's appeal. Additionally, we agree with the State's assertion that the federal statute at issue is divisible. See, e.g., *State v. Buckley*, No. 120,532, 2020 WL 1649923, at *3 (Kan. App. 2020) (unpublished opinion). When such provisions are the focus of a criminal history challenge reviewing courts are permitted to implement the "modified categorical approach" which allows the use of select documents to determine "what crime, with what elements" a defendant was

previously convicted of. See *Mathis v. United States*, 579 U.S. 500, 505, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016). That limited list includes charging documents of the old case, any plea agreements, transcripts of plea hearings, findings of fact and conclusions of law from any bench trial, as well as jury instructions and completed verdicts. *State v. Degand*, 63 Kan. App. 2d 457, 460, 530 P.3d 439 (2023). This procedure has been approved by the Kansas Supreme Court in *State v. Dickey*, 301 Kan. 1018, 1037-38, 350 P.3d 1054 (2015).

18 U.S.C. § 2113(a) essentially defines three separate crimes: (1) bank robbery; (2) bank extortion; and (3) entering a bank intending to commit larceny or another felony. *State v. Lax-Dudley*, No. 119,253, 2019 WL 5849919, at *7 (Kan. App. 2019) (unpublished opinion); see also *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) ("Section 2113[a] seems to contain a divisible set of elements . . . taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to commit any felony affecting it . . . on the other."); *United States v. Rinker*, 746 Fed. Appx. 769, 772 (10th Cir. 2018) (unpublished opinion) (holding that federal bank robbery statute is divisible).

The divisibility of 18 U.S.C. § 2113(a) is noteworthy here because the first crime defined in the statute, bank robbery, is, without question, a person felony. That is, bank robbery requires "force and violence, or . . . intimidation," coupled with a taking "from the person or presence of another." 18 U.S.C. § 2113(a). These two elements also correlate with two of the circumstances listed in K.S.A. 2021 Supp. 21-6811(e)(3)(B)(i): "(b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;" and "(d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance." Thus, because the elements of bank robbery necessarily require the presence of a person during its commission, and further, because two of the statutorily enumerated

circumstances are readily identifiable in the federal bank robbery offense, it is properly classified as a person felony. See also *Buckley*, 2020 WL 1649923, at *2 ("[I]t appears federal bank robbery would be a person felony.").

We recognize that neither of the other two offenses defined in 18 U.S.C. § 2113(a), bank extortion and entering a bank intending to commit larceny or another felony, are comprised of elements which require proof of any of the circumstances listed in K.S.A. 2021 Supp. 21-6811(e)(3)(B)(i). Accordingly, we have no quarrel with the conclusion reached by Jeffcoat that those two offenses should be classified as nonperson felonies by Kansas courts.

Jeffcoat encourages us to focus on the second of those two options and directs our attention to *Busch* as the purportedly appropriate analytical tool for resolving this issue. But Jeffcoat's case is readily distinguishable. *Busch* contemplated prior convictions for burglary in New Jersey. No version of the elements for that state's statute of conviction required proof that the enclosed structure Busch burgled was a residence, dwelling, or habitation. Additionally, those elements did not require proof of any of the circumstances for person felonies under the criminal history classification statute. See K.S.A. 2021 Supp. 21-6811(e)(3)(B)(iii). Therefore, Busch's out-of-state felony convictions for burglary had to be classified as nonperson felonies for purposes of his criminal history score at sentencing. 317 Kan. at 313.

By contrast, the federal judgment Jeffcoat attached to his brief reflects that he was specifically convicted of "Bank Robbery." Additionally, the presentence investigation report (PSI) in this case listed the prior crime as a "Bank Robbery." See *Busch*, 317 Kan. at 313-314 (PSI's designation of a crime is evidence that the district court can consider in determining whether the State has satisfied its burden of proof regarding an offender's criminal history). These facts all indicate that Jeffcoat was convicted of the bank robbery portion of 18 U.S.C. § 2113(a), and as outlined above, the elements of bank robbery place

it well within the scope of a person felony. Accordingly, Jeffcoat has failed to meet his burden of establishing prejudicial error because he has not provided a record which affirmatively demonstrates that his challenged prior offense constitutes one of the nonperson felonies outlined under 18 U.S.C. § 2113(a). While our conclusion requires no reinforcement given that the burden was Jeffcoat's and he has failed to satisfy that obligation, we nevertheless point out that our conclusion draws further support from the federal indictment provided by the State. That document reveals that "by force, violence, and intimidation, [Jeffcoat] took from the person and presence of Goppert State Service Bank employee Carole Jo Hopkins, money belonging to and in the care, custody, control, management, and possession of Goppert State Service Bank" Therefore, we affirm the sentence imposed by the district court in accordance with a B level criminal history score given Jeffcoat's two prior convictions for person felonies.

Affirmed.