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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2219**

State of Minnesota,
Respondent,

vs.

James Darrel Ober,
Appellant.

**Filed January 21, 2014
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-11-18122

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant James Darrel Ober challenges the district court's severity-level ranking and sentencing orders, arguing that the district court committed reversible error by adopting respondent State of Minnesota's proposed orders nearly verbatim, and that the district court abused its discretion by ranking appellant's racketeering offense at severity level IX and sentencing him to 120 months in prison, an upward durational departure of 34 months. We affirm.

FACTS

The facts of this case are undisputed on appeal. Between June 2009 and August 2010, appellant and his wife operated Mortgage Planners Incorporated (MPI), which is a brokerage firm for lenders such as Franklin America Mortgage Corporation (FAMC). At least four other individuals worked for appellant and his wife at MPI. Appellant was the public face of MPI and was also a loan officer. He solicited distressed homeowners and other individuals to participate in fraudulent mortgage transactions. Some individuals did not know that appellant used their names to purchase homes and secure loan financing.

Appellant originated 37 loans containing misrepresentations, including fake employers and educational backgrounds. These misrepresentations were supported by forged signatures on loan applications and fabricated documents such as pay stubs, bank statements, and transcripts. Appellant admitted that the scheme involved counterfeit divorce decrees, using the identities of real judges, attorneys, and court staff. Appellant and his wife also created fake companies to become third-party mortgagees for sham junior mortgages.

By doing so, appellant and his wife received not only fees and commissions from the lender, but also the equity that the homeowners would have received if they had redeemed their homes through the sheriff's foreclosure sale. MPI received over \$257,000 in fees and commissions for appellant's fraudulent loans and received a total kickback of about \$1 million for all fraudulent loans including payoffs from fraudulent junior mortgages. The total amount of theft committed by appellant across the 37 loans was over \$5 million.

The district court conducted evidentiary hearings from March to May 2012. Appellant pleaded guilty to one count of racketeering in violation of Minn. Stat. § 609.903, subd. 1(1) (2008). There was no plea agreement, and appellant waived his jury trial rights as to the request for an aggravated durational sentencing departure. The district court ranked appellant's racketeering conviction at severity level IX and sentenced him to 120 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not err by adopting nearly verbatim respondent's proposed orders.

Appellant first argues that the district court erred by adopting nearly verbatim respondent's proposed orders on severity-level ranking and sentencing. "[T]he practice of the verbatim adoption of a party's proposed findings and conclusions is hardly commendable." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). "[I]t is preferable for a court to independently develop its own findings." *Dukes v. State*, 621 N.W.2d 246, 258 (Minn. 2001). In reviewing a district court's verbatim adoption of one party's proposed findings of fact, the Minnesota Supreme Court has instructed that we should "devote special

care . . . in the volume of evidence we sift in judging the correctness of such findings.” *Id.* at 258–59 (quotation omitted). “[I]f after such a review we conclude that the findings are not clearly erroneous, the verbatim adoption, standing alone, . . . does not constitute grounds for reversal.” *Id.* at 259.

Here, the record reveals that the district court adopted much of the language from respondent’s proposed orders. Appellant argues that reversal is necessary under *Pederson*. In that case, the Minnesota Supreme Court, “[o]ut of concern that the process employed” gave “the appearance of impropriety,” reversed the district court’s denial of postconviction relief which adopted verbatim the state’s proposed findings of facts. *Pederson*, 649 N.W.2d at 163. But appellant’s reliance on *Pederson* is misplaced. In *Pederson* the district court’s order was “predicated ex parte on findings and conclusions drafted by the prosecution” and the other party had not “been given the opportunity to respond to proposed findings and conclusions prior to verbatim adoption.” *Id.* at 164. No such flawed procedure occurred here—appellant was offered the opportunity to submit proposed orders, and he submitted a memorandum supporting his arguments while choosing not to submit any proposed orders.

Moreover, there is no appearance of impropriety reflected in the district court’s near-verbatim adoption. Indeed, in ranking appellant’s conviction at severity level IX and sentencing him to 120 months in prison, the district court rejected respondent’s proposed severity-level ranking of X and proposed sentence of 150 months. Also, in its analysis comparing the severity levels assigned to other offenders, the district court changed the proposed order to specifically point out that appellant, unlike the offender in another case,

did not commit any acts of violence. These differences show that the district court independently analyzed the issues and arrived at an impartial judgment.

Without anything in the record evidencing the appearance of impropriety, clear error is a prerequisite for reversal under *Dukes*. Appellant does not challenge any of the district court's factual findings as clearly erroneous. The district court's near-verbatim adoption alone, therefore, does not warrant reversal.

II. The district court did not abuse its discretion in assigning a severity level of IX to appellant's racketeering conviction.

Appellant next argues that the district court erred in ranking his racketeering conviction at severity level IX. The district court's assignment of an offense severity level is reviewed for an abuse of discretion. *State v. Kenard*, 606 N.W.2d 440, 442 (Minn. 2000). Under the Minnesota Sentencing Guidelines, most offenses are assigned a severity level between I and XI for determining the presumptive sentence, but certain offenses, such as racketeering, are unranked. Minn. Sent. Guidelines II.A, V (2008). In such a case, "sentencing judges shall exercise their discretion by assigning an appropriate severity level for that offense and specify on the record the reasons a particular level was assigned." *Id.* II.A. The supreme court has recommended four factors to be considered when assigning a severity level to unranked offenses: (1) "the gravity of the specific conduct underlying the unranked offense"; (2) "the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense"; (3) "the conduct of and severity level assigned to other offenders for the same unranked offense"; and (4) "the severity level assigned to

other offenders who engaged in similar conduct.” *Kenard*, 606 N.W.2d at 443. “No single factor is controlling nor is the list of factors meant to be exhaustive.” *Id.*

Here, the district court found that all four *Kenard* factors weigh in favor of a severity level IX ranking. Appellant argues that the district court erred in its findings as to the first three factors. We disagree and address each in turn.

A. Gravity of the specific conduct

The district court found the gravity of appellant’s conduct to be “unique and extraordinary.” The district court reasoned that:

The conduct was a major economic offense with several direct victims. Moreover, the conduct did harm to the entire community by undermining the public’s confidence in the integrity of the residential mortgage system. The conduct entailed a high level of sophistication and planning and warrants punishment which recognizes that the wrongdoing was deliberate and calculated, rather than foolhardy and impulsive.

Appellant argues that the circumstances of several victims and a sophisticated level of planning “are present in every racketeering charge.” But appellant cites to nothing in the record or caselaw to support this assertion. In fact, caselaw supports the opposite: In *State v. Huynh*, the racketeering offense involved only one victim, and the supreme court did not hold sophisticated planning to be one of the predicate acts required for a racketeering conviction. 519 N.W.2d 191, 192, 196 (Minn. 1994). Appellant also argues that “it’s difficult to imagine how [undermining the public’s confidence can be] possible given the system’s performance over the last decade.” But appellant again cites nothing to support this vague assertion. The district court reasonably considered and applied this factor.

B. Severity level assigned to any ranked offense whose elements are similar

The district court found that “the parties both agree that [appellant’s] pattern of criminal activity included the predicate offense[] of theft by swindle over \$35,000, a level-VI offense.” The district court also analyzed the evidence and concluded that respondent has demonstrated beyond a reasonable doubt “the existence of the predicate offense of identity theft over \$35,000.” Accordingly, the district court “include[d] a finding of this level-VIII predicate offense for purposes of the *Kenard* analysis.”

Appellant does not challenge the district court’s identity-theft finding, but he argues that the district court abused its discretion by “using identity theft as the baseline predicate offense” because the “gravamen” of his racketeering offense did not involve identity theft. He also suggests that it was not the district court’s “responsibility to determine whether [he] was involved with the identity theft since it was a disputed issue.”

But appellant’s position would produce the absurd result that a district court can never consider the underlying conduct when a straight plea is entered. Moreover, appellant cites to no caselaw demonstrating that the district court overstepped its bounds in considering the underlying conduct of identity theft. Nor can we find any. The Minnesota Statutes list identity theft as one of the “criminal acts” constituting racketeering. Minn. Stat. § 609.902, subd. 4 (citing Minn. Stat. § 609.527, subd. 3(4) (2008)); Minn. Stat. § 609.903, subd. 1. Therefore, the district court properly exercised its discretion in considering identity theft for determining the presumptive sentence for a racketeering conviction.

C. Conduct of and severity level assigned to other offenders

The district court considered other offenders of racketeering and concluded that cases “where the underlying predicate offense is theft by swindle over \$35,000 are routinely ranked at level IX” and that cases “where at least one underlying predicate offense is level VIII have been ranked at level X.” The district court thus found “ample support” for ranking appellant at level IX.

Appellant cites to a report from the Minnesota Sentencing Guidelines Commission and argues that “[t]he majority of courts apply a severity level of [VIII] or less to racketeering” and that “[t]he nature of the conduct in this case does not justify a severity level greater than the norm.” But the report also shows that the most frequently applied severity level is IX. Appellant does not explain how the nature of the conduct in cases with a severity level of VIII or lower mandates a similar ranking for appellant’s conduct. Nor does he provide any arguments as to why it was an abuse of discretion for the district court to consider cases with a severity level of IX or X. The district court fully analyzed the caselaw to determine what was appropriate to the circumstances, and it did not abuse its discretion in doing so.

We conclude that the district court properly considered and applied the *Kenard* factors and therefore did not abuse its discretion in assigning a severity level of IX to appellant’s racketeering conviction.

III. The district court did not abuse its discretion by imposing an upward durational departure.

Finally, appellant argues that the district court erred in sentencing him to 120 months in prison, an upward durational departure of 34 months from the presumptive sentence of 86 months for a severity level IX offense with a zero criminal-history score.

Departures from presumptive sentences are reviewed for an abuse of discretion, but there must be “substantial and compelling circumstances” in the record to justify the departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). When “the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a strong feeling that the sentence is disproportional to the offense.” *State v. Woelfel*, 621 N.W.2d 767, 774 (Minn. App. 2001) (quotations omitted), *review denied* (Minn. Mar. 27, 2001). The Minnesota Sentencing Guidelines set forth “a nonexclusive list of factors which may be used as reasons for departure.” Minn. Sent. Guidelines II.D.2 (2008). Whether a particular reason for an upward departure is permissible is a question of law, which this court reviews de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). “Even a single aggravating factor may justify a departure.” *Id.* at 599.

Appellant challenges all four of the district court’s reasons for imposing an upward departure. This argument has some merit, but we conclude that the district court ultimately did not err in departing. We address each of the district court’s departure reasons in turn.

A. Crime committed by three or more persons

The district court found that one aggravating factor supporting an upward departure is that appellant “committed the crime as part of a group of three or more persons who all actively participated in the crime.” Minn. Stat. § 244.10, subd. 5a(10) (2008); *see also* Minn. Sent. Guidelines II.D.2.b(10). Appellant does not challenge the district court’s factual finding that appellant committed racketeering as part of a group of three or more, but he argues that this characteristic cannot be the basis of an upward departure because the participation of several people is “typical” of a racketeering offense. *See State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002) (holding that the sentencing court must determine “whether the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question”).

But appellant points to no evidence in the record or caselaw to support his assertion that the participation of several people is typical of a racketeering offense. Moreover, in *State v. Kujak*, we rejected this exact argument, and we held that “the sentencing guidelines’ nonexclusive list of aggravating factors applies to all offenses, including racketeering.” 639 N.W.2d 878, 882 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002). The district court, therefore, properly exercised its discretion in using this aggravating factor to justify an upward departure.

B. The use of identities of others without authorization

Although one aggravating factor is enough to justify an upward departure, the district court also identified an alternative basis: appellant’s crime “involved the knowing

participation in a counterfeit divorce decree scam—a scam that used the identities of others without authorization.” *See* Minn. Stat. § 244.10, subd. 5a(12) (2008); *see also* Minn. Sent. Guidelines II.D.2.b(12). Appellant does not challenge the district court’s factual finding but contends that “the creation of the divorce decrees was part and parcel of the mortgage fraud/theft by swindle scheme.” He therefore argues that the district court improperly used an element of the underlying crime as a reason for departure. *See State v. Blanche*, 696 N.W.2d 351, 378–79 (Minn. 2005) (holding that “[t]he reasons used for departing must not themselves be elements of the underlying crime.”).

But that particular conduct is present in a case does not make it an element of the offense. A person is guilty of racketeering if the person “is employed by or associated with an enterprise and intentionally conducts or participates in the affairs of the enterprise by participating in a pattern of criminal activity.” Minn. Stat. § 609.903, subd. 1(1). Neither the caselaw definition of “enterprise” nor the statutory definition of a “pattern of criminal activity” includes identity theft as an element of the racketeering offense. *See Huynh*, 519 N.W.2d at 196 (definition of “enterprise”); *see also* Minn. Stat. § 609.902, subd. 6 (2008) (definition of “pattern of criminal activity”). Accordingly, appellant’s conduct of identity theft was not required for the conviction of his racketeering offense, so the district court properly used it as a reason for departing.

C. Major economic offense

Another basis for the district court’s upward departure was the finding that appellant’s racketeering crime was “a major economic offense.” *See* Minn. Sent. Guidelines

II.D.2.b(4). A major economic offense is an appropriate aggravating factor for departing and is characterized by the presence of at least two of the following circumstances:

- (a) [T]he offense involved multiple victims or multiple incidents per victim;
- (b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
- (c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; [or]
- (d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships

Id.

Appellant argues that the district court already considered the factor of a major economic offense for evaluating the gravity of the conduct while ranking the severity level; therefore, it cannot use this same factor for departing.¹ *See State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983) (holding that facts “are not grounds for departure because those facts were considered . . . in determining the severity of the offense”). We agree.

The district court found, and respondent argues, that the factor of a major economic offense is not an improper basis for departing because the circumstances justifying the severity-level ranking are different than those justifying the upward departure. That is, the district court relied on the circumstances of multiple victims and a high degree of sophistication for the severity-level ranking, but, for the upward departure, the district court

¹ Appellant also argues that racketeering offenses “almost always, if not always, involve great economic loss”; therefore, this typical characteristic cannot be a reason for departing. But appellant cites to nothing in the record or caselaw to support this assertion, and as already discussed, “the sentencing guidelines’ nonexclusive list of aggravating factors applies to all offenses, including racketeering.” *Kujak*, 639 N.W.2d at 882.

relied on the different circumstances of a monetary loss substantially greater than the minimum loss and appellant's use of his position or status to facilitate the commission of the offense. Respondent points out that the district court was "mindful not to consider those aspects of conduct [considered for the severity-level ranking] when weighing whether or not [appellant's] conduct constitutes a major economic offense."

However, the district court, in ranking appellant's severity level, specifically found that appellant's "conduct was a major economic offense." In that analysis, the district court did not limit its discussion to only the circumstances of multiple victims and a high degree of sophistication. Indeed, the district court undoubtedly considered monetary loss in evaluating the gravity of the offense:

The total dollar amount of theft committed by [appellant] across these 37 loans was \$5,437,688.

....

Another facet of [appellant's] crime[] that speaks to the gravity of [his] offense is the amount of illicit profits [he] received The testimony of [a representative of FAMC] established that MPI was paid over \$257,000 in fees and commissions through the fraudulent loans where [appellant] was the loan officer These figures do not count the proceeds that [appellant] earned through payoffs of phony second mortgages, which . . . totaled over \$650,000 using only the transactions discussed during the evidentiary hearing. Looking only at the fees earned by [appellant] plus the payoffs of phony second mortgages brings the kickback total to nearly \$1 million. That total surpasses the kickbacks earned by defendants in [other racketeering] cases

This consideration of monetary loss overlaps with the district court's analysis that the offense involved a monetary loss substantially greater than the minimum loss specified in

the statute. The district court cited its own gravity-of-the-offense analysis for the fact that appellant's theft "exceeded \$5 million." And in both the district court's ranking of the severity level and in imposing an upward departure, the district court discussed appellant's gains from the junior-mortgage scheme.

In light of this overlapping use of a circumstance, we conclude that the district court abused its discretion in using a major economic loss as a reason for departing. But the district court cited two other independent and proper grounds for departing, therefore, this error was harmless.

D. Victim was particularly vulnerable

The district court's final reason for departing was that appellant and his wife "knowingly targeted a vulnerable population of homeowners in foreclosure and then exploited those homeowners' ignorance of the foreclosure process in furtherance of their scheme." *See* Minn. Sent. Guidelines II.D.2.b(1) (listing the aggravating factor that "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender"). The district court also stated that it was "not limited to statutorily-defined bases for upward departures." *See* Minn. Stat. § 244.10, subd. 5a (2008) (listing non-exhaustive aggravating factors).

Appellant argues that the district court improperly "extended application of the particularly vulnerable victim category" because it "was not designed to encompass persons considered economically vulnerable."² We have found no Minnesota caselaw using

² Respondent declined to argue this issue because the sentencing order "makes it less than clear that the district court actually relied on this ground."

economic vulnerability—as opposed to physical vulnerability—as an appropriate aggravating factor. *See Dillon*, 781 N.W.2d at 597–98 (collecting cases on victim’s vulnerability); 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 36:41, G.2.A (4th ed. 2005) (same). But because the district court properly departed based on other aggravating factors, we decline to reach this issue.

Affirmed.