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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2163, A13-1439**

State of Minnesota,
Respondent,

vs.

Wendy Lea Ober,
Appellant A12-2163,

State of Minnesota,
Respondent,

vs.

Wendy Lea Ober,
Appellant A13-1439.

**Filed February 10, 2014
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-11-18119

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant Wendy Ober)

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

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant challenges the district court's severity-level ranking and sentencing orders, arguing that the district court erred by (1) adopting respondent's proposed orders nearly verbatim; (2) ranking appellant's racketeering offense at severity level IX; (3) sentencing her to 120 months in prison, an upward durational departure of 34 months; (4) awarding restitution under the identity-theft statute; and (5) awarding restitution to the homeowner-victims. We affirm in part the severity-level ranking, upward sentencing departure, and restitution award to one homeowner-victim. But because the district court abused its discretion in awarding restitution under the identity-theft statute, we reverse in part. We also reverse the restitution awards to the remaining homeowner-victims and remand to the district court for its consideration of whether the forfeiture of proceeds under the racketeering statute is appropriate.

FACTS

Between June 2009 and August 2010, appellant and her husband operated Mortgage Planners Incorporated (MPI) as a brokerage firm for lenders. At least four other individuals worked for appellant and her husband at MPI. Appellant was the production manager and intermediary between MPI and the lenders.

Through MPI, appellant and her husband operated a racketeering scheme involving multiple layers of fraud. MPI solicited distressed homeowners facing foreclosure to sell their properties to buyers who were also solicited by MPI. At least one buyer, R.V., was unaware that MPI used her name to secure mortgage financing and

purchase the distressed homeowners' properties. MPI then fraudulently qualified these buyers for mortgage financing from lenders. Appellant originated 36 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 college transcripts. Appellant admitted that the scheme also involved counterfeit divorce decrees, which used the identities of real judges, attorneys, and court staff.

Appellant then created sham junior mortgages on the homeowners' properties. This fraud was accomplished by creating fake companies to become third-party mortgagees that appeared to have no relationship to any parties to the transactions. Appellant forged and falsely notarized the homeowners' signatures for the mortgages. Appellant also dated these sham junior mortgages so that they appeared to have been created before the sheriff's foreclosure sale, but they were not recorded until the sheriff's sale. If the homeowners had been in the position to redeem their properties, and these sham junior mortgages had not existed, then the homeowners would have retained the equity that they had acquired in their homes. But when the homeowners sold their properties during the redemption period, the disbursements from the lenders were directed to satisfy the sham junior mortgages. Through this scheme, appellant profited not only by receiving the fees and commissions from the lenders for originating the mortgages, but also by obtaining the equity that the homeowners had in their homes through the sham junior mortgages. The total amount of theft committed by appellant across the 36 loans was over \$5 million.

Respondent State of Minnesota charged appellant with racketeering in violation of Minn. Stat. § 609.903, subd. 1(1) (2008), and aiding and abetting racketeering in violation of Minn. Stat. § 609.05 (2008). Respondent later amended the probable cause portion of the criminal complaint to add an allegation of identity theft. Without a plea agreement, appellant pleaded guilty to racketeering. In her factual support for the plea, appellant admitted to numerous acts of theft by swindle and mortgage fraud, but did not admit to the identity theft of R.V. She admitted to submitting numerous fraudulent mortgage loan application documents, including counterfeit divorce decrees.

Appellant waived her right to a trial by jury, and the district court conducted evidentiary hearings pursuant to *State v. Kenard*, 606 N.W.2d 440 (Minn. 2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct 2531 (2004). The district court ranked appellant's racketeering conviction at severity level IX, sentenced her to 120 months in prison, and ordered her to pay \$1,000 in restitution pursuant to the identity-theft statute, Minn. Stat. § 609.527, subd. 4(b) (2008). In addition, the district court awarded restitution to B.W., M.F. and L.F., and R.P. and M.P.—homeowners who sold their properties as part of the racketeering scheme. Appellant challenged the restitution awards. The district court conducted a restitution hearing and subsequently adjusted restitution awards not challenged on appeal.

This appeal followed.

DECISION

I.

Appellant first argues that the district court erred by adopting nearly verbatim the state's proposed orders addressing the issues of severity-level ranking, sentencing, and restitution. "[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 the state's proposed orders. Appellant argues that reversal is necessary under *Pederson*. There, 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. 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 had the opportunity to submit proposed orders, chose not to do so, and instead submitted a memorandum supporting her arguments.

Moreover, we find no appearance of impropriety reflected in the district court’s near-verbatim adoption of the state’s proposed orders. In ranking appellant’s conviction at severity level IX and sentencing her to 120 months in prison, the district court rejected the state’s proposed severity-level ranking of X and proposed sentence of 150 months. And in its analysis comparing the severity levels assigned to other offenders, the district court clarified that it would not rely on another racketeering case that involved acts of violence because appellant 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.

Appellant next argues that the district court erred in ranking her racketeering conviction at severity level IX. The district court’s assignment of an offense severity level is reviewed for an abuse of discretion. *Kenard*, 606 N.W.2d at 442. 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). When determining a severity level for an unranked offense, “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. In doing so, four factors are considered: (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.*

At the outset, we note that appellant does not challenge the district court’s determination as to the third and fourth *Kenard* factors, which means that our review begins with the presumption that the district court properly considered these factors and found that they support a severity-level IX ranking. Appellant contends that the district court erred in its findings as to the first two *Kenard* factors. In evaluating the gravity of the conduct, the district court considered, among other things, the fact that appellant fraudulently secured mortgage financing for buyers. And in evaluating the severity level assigned to any ranked offense whose elements are similar, the district court concluded that respondent had demonstrated beyond a reasonable doubt that appellant committed identity theft by fraudulently using R.V.’s identity to secure mortgage financing in her name.

Appellant argues that “by using the separate offense of racketeering with a predicate crime of identity theft, the court based its ranking on an offense to which appellant did not plead guilty and was not convicted.” She also suggests that it was not

the district court's "responsibility to determine whether [she] 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. Appellant cites 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 include certain acts of identity theft as "criminal acts" constituting racketeering. Minn. Stat. § 609.902, subd. 4 (citing Minn. Stat. § 609.527, subd. 3(4)); Minn. Stat. § 609.903, subd. 1. Therefore, the district court properly exercised its discretion in considering identity theft for assigning a severity level of IX to appellant's racketeering conviction. In doing so, the district court explained, and appellant does not dispute, that the testimonial and documentary evidence established, among other things, that: (1) appellant asked her husband to create a phone account in R.V.'s name so that she could communicate with the lender; (2) this telephone number was assigned to a cell phone that was found in appellant's home; (3) the fabricated documents were created in R.V.'s name; (4) R.V.'s mail was transferred to appellant's home without her knowledge; (5) appellant manipulated R.V.'s credit score; and (6) images of fabricated identification cards in RV.'s name were found in a digital storage device seized from appellant's home. Although appellant denied the identity-theft allegation, the district court found appellant "simply not credible." Accordingly, the district court found beyond a reasonable doubt that appellant committed the identity theft of R.V.

We conclude that the district court did not abuse its discretion in determining that all four *Kenard* factors weigh in favor of a severity level IX ranking.

III.

Appellant contends that the district court erred in sentencing her 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, and there must be “substantial and compelling circumstances” in the record to justify departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). “If 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. Anderson*, 356 N.W.2d 453, 454 (Minn. App. 1984) (quotation omitted). 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 (Supp. 2009). 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.

The district court upwardly departed for four reasons. Appellant argues that the district court erred as to all four reasons. We disagree.

A. Crime committed by three or more persons and major economic offense

The district court found that appellant committed racketeering as a part of a group of three or more persons and that the crime is a major economic offense. These are two proper aggravating factors under the sentencing guidelines. *See* Minn. Sent. Guidelines II.D.2.b(4), (10).

Appellant does not challenge the district court’s factual findings as to these two aggravating factors. Instead, she contends that these factors cannot be reasons for departing because a racketeering offense “will necessarily involve great economic loss, a number of thefts, and include multiple individuals.” But appellant points to no evidence in the record or caselaw to support her assertion. Moreover, in *State v. Kujak*, we rejected this same 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 these aggravating factors to justify an upward departure.

B. The use of identities of others without authorization

The district court also upwardly departed because 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. Sent. Guidelines II.D.2.b(12) (listing the offender’s use of another’s identity without authorization as an aggravating factor). The district court determined that appellant was “actively and knowingly

involved in the creation and use of counterfeit divorce decrees.” Appellant does not challenge this factual finding, but she argues that:

[She] did not use the identity of another person to commit her offense. Appellant submitted counterfeit divorce decrees in mortgage loan applications, but appellant did not present herself as somebody else when she did it. Wendy Ober, as Wendy Ober, submitted the counterfeit divorce decrees. Wendy Ober did not pretend to be a judge of district court or anybody else. Wendy Ober did not assume somebody else’s identity when she submitted the fraudulent mortgage loan applications.

The fact that appellant physically submitted the counterfeit divorce decrees as herself does not absolve her of using the identities of judges and court personnel in creating the counterfeit documents in the first place.

C. Victim was particularly vulnerable

The district court’s final reason for departing was that appellant “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 (Supp. 2009) (providing a non-exhaustive list of 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.”¹ We have found no Minnesota caselaw using economic vulnerability—as opposed to physical vulnerability—as an appropriate aggravating factor. *See Dillon*, 781 N.W.2d at 597–98 (collecting cases examining the victim’s vulnerability); 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 36:41, G.2.A (4th ed. 2012) (same). But because the district court properly departed based on other aggravating factors, we decline to address this issue. *Cf. Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) (holding that a departure will be affirmed if there is sufficient evidence in the record to justify departure, even if the reasons given are improper or inadequate).

IV.

Turning to issues of restitution, appellant first argues that the district court erred in awarding \$1,000 to R.V. under the identity-theft statute, Minn. Stat. § 609.527, subd. 4(b), which allows the award of restitution from “a person convicted of” the crime of identity theft. Although the district court considered the allegation of identity theft of R.V. in sentencing appellant, appellant was neither charged with nor convicted of identity theft. Respondent concedes that the district court erred as to this issue. Because the statutorily required conviction is lacking, we reverse the district court’s restitution award of \$1,000 to R.V.

¹ Respondent declined to argue this issue because the sentencing order “makes it less than clear that the district court actually relied on this ground.”

V.

Finally, appellant argues that the district court erred in ordering appellant to pay restitution to the homeowner-victims who sold their homes to buyers under appellant's racketeering scheme. This court reviews a district court's restitution order for an abuse of discretion. *State v. Ramsay*, 789 N.W.2d 513, 517 (Minn. App. 2010). But "whether an item meets the statutory requirements for restitution is a question of law that is 'fully reviewable by the appellate court.'" *Id.* (quotation omitted).

"The primary purpose of the [restitution] statute is to restore crime victims to the same financial position they were in before the crime." *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). Restitution "may include, but is not limited to, any out-of-pocket losses resulting from the crime, including medical and therapy costs, [and] replacement of wages and services." Minn. Stat. § 611A.04, subd. 1(a) (2008). "[T]he record must provide a factual basis for the amount awarded by showing the nature and amount of the losses with reasonable specificity." *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000). "The burden of demonstrating the amount of loss sustained by a victim as a result of the offense and the appropriateness of a particular type of restitution is on the prosecution." Minn. Stat. § 611A.045, subd. 3(a) (2008). When in dispute, the amount of restitution must be shown by a preponderance of the evidence. *Id.*

Here, the district court awarded restitution to the homeowners "based on the equity that [appellant] stole through sham junior mortgages, less the money [appellant] paid the homeowners or on the homeowners' behalf." Accordingly, the district court

ordered appellant and her husband to pay: \$69,987.45 to A.K.; \$99,831.88 to B.W.; \$89,667.62 to M.F. and L.F.; and \$79,297.74 to R.P. and M.P.

Appellant argues that because “[t]he premise of the court’s restitution award was that each of the homeowners would have had the ability to obtain financing to purchase the property through the redemption process,” the district court failed to “tackl[e] the issue of whether the homeowners could have redeemed the property had they never met the defendants.” We agree. The point of restitution is to restore the victims to their financial position before the crime, so the district court must necessarily define that financial position to award restitution. If the evidence is such that a homeowner was unable to redeem his or her property prior to being lured into appellant’s racketeering scheme, then the homeowner’s financial position would not include the equity that the homeowner could have gained from redeeming the property. Absent evidence that a homeowner was in a financial position to possess the equity, the district court’s award of restitution based on such equity is improper.

Respondent argues that “[w]hether the homeowners would have or could have redeemed the property themselves or sold the property to someone else during the redemption period absent the intervention of [appellant] is beside the point.” Respondent asserts that restitution based on the lost equity is proper because such equity “is the way in which [appellant] profited from the [racketeering] scheme.”

But whether the homeowners were in the financial position to redeem the properties is relevant because restitution must be based on the victims’ financial position before the crime. The homeowners could not be deprived of what they could not have

possessed in the first place. And because the point of restitution is not to award victims a windfall for having been defrauded, the fact that appellant illicitly profited from the homeowners does not automatically mean that the homeowners are entitled to such profits as restitution.

The evidence demonstrates that most of the homeowners could not have redeemed their properties. At the evidentiary hearings, B.W. and R.P. testified that they were unable to redeem. No testimony or other evidence indicated whether M.F. and L.F. could have redeemed. In fact, A.K. was the only homeowner who testified that she could have redeemed her property. Accordingly, there is no factual basis for awarding the lost equity as restitution when the record does not support—and in some cases, the record is against—the idea that the homeowners were in the financial position to possess such potential equity. The restitution award to A.K. was proper, but the district court abused its discretion in awarding restitution to B.W., M.F. and L.F., and R.P. and M.P.

Appellant also argues that any restitution award should be modified because the district court “did not consider the submitted defense exhibits outlining the costs and fees associated with transferring the homes.” But this argument is not persuasive because in its original sentencing order awarding restitution, the district court “note[d] the serious reliability issues with [appellant’s] accounting schedules.” The district court, therefore, properly refused to offset the restitution awards based on appellant’s accounting schedules.

In reversing in part the restitution awards to the homeowner-victims, we note that the racketeering statute allows the district court to order the forfeiture of “any real and

personal property that was used in the course of, intended for use in the course of, derived from, or realized through conduct in” committing racketeering. Minn. Stat. § 609.905, subd. 1 (2008). “[A]ny property constituting proceeds” may be ordered to be forfeited. *Id.* In this case, the district court “reserve[d] the issue of forfeiture under the racketeering statute.” Since we have reversed in part the restitution awards to the homeowner-victims and the district court specifically reserved the issue of forfeiture, it is necessary that this matter be remanded to the district court for its consideration of this issue.

In sum, we affirm the district court with respect to: (1) the severity-level ranking of IX; (2) the imposition of an upward departure of 34 months; and (3) the restitution award of \$69,987.45 to A.K. We reverse: (1) the restitution award of \$1,000 to R.V.; and (2) the restitution awards of: \$99,831.88 to B.W., \$89,667.62 to M.F. and L.F., and \$79,297.74 to R.P. and M.P. We remand this matter to the district court for its consideration of the forfeiture of property under the racketeering statute.

Affirmed in part, reversed in part, and remanded.