STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1293

State of Minnesota,
Respondent,

vs.

Joseph Duane Gustafson, Jr.,
Appellant.

Filed August 19, 2013
Affirmed in part, reversed in part, and remanded
Johnson, Chief Judge

Hennepin County District Court
File No. 27-CR-11-5352

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

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

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

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge; and Hooten, Judge.

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

JOHNSON, Chief Judge

A Hennepin County jury found Joseph Duane Gustafson, Jr., guilty of racketeering, terroristic threats, kidnapping, controlled-substance offenses, possession of

firearms by a prohibited person, and theft by swindle. Gustafson argues that the evidence is insufficient to sustain his conviction of racketeering and that the district court erred by admitting certain evidence offered by the state. Gustafson also argues that the district court erred at sentencing in determining the severity level of the racketeering offense and his criminal history score. Gustafson makes several additional arguments in a *pro se* supplemental brief. We affirm Gustafson's conviction but reverse and remand for a redetermination of his criminal history score. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

In February 2011, the state charged Gustafson with 13 offenses: racketeering, assault, terroristic threats, kidnapping, three counts of controlled-substance offenses, two counts of possession of a firearm by a prohibited person, and four counts of theft by swindle. The complaint alleged that Gustafson committed these offenses with other members of the "Beat-Down Posse" (BDP), a group of persons allegedly led by Gustafson and his father.

The case was tried for 12 days in March 2012. The jury found Gustafson not guilty of assault but found him guilty of the other 12 charges. The district court sentenced Gustafson to 210 months of imprisonment on the racketeering conviction and imposed concurrent sentences of shorter durations on the remaining 11 offenses. Gustafson appeals.

D E C I S I O N

I. Racketeering

Gustafson argues that the evidence is insufficient to support his conviction of racketeering. He contends that the state's evidence is insufficient to prove that he participated in a pattern of criminal activity.

When considering a claim of insufficient evidence, this court conducts "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 a verdict of guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). "[W]e 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 that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

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) (2008). Two key terms in this statute are defined elsewhere in chapter 609. First, an "enterprise" is defined to mean "a sole proprietorship, partnership, corporation, trust, or other legal entity, or a union, governmental entity, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well as legitimate enterprises." Minn.

Stat. § 609.902, subd. 3 (2008). The common characteristics of an "enterprise," for purposes of the racketeering statute, are:

> (1) a common purpose among the individuals associated with the enterprise; where
>
> (2) the organization is ongoing and continuing, with its members functioning under some sort of decisionmaking arrangement or structure; and where
>
> (3) the activities of the organization extend beyond the commission of the underlying criminal acts either to coordinate the underlying criminal acts into a pattern of criminal activity or to engage in other activities.

State v. Huynh, 519 N.W.2d 191, 196 (Minn. 1994). Second, a "pattern of criminal activity" is defined to mean "conduct constituting three or more criminal acts" that are "neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a single criminal offense." Minn. Stat. § 609.902, subd. 6 (2008). The criminal acts that constitute a pattern of criminal activity must be committed within 10 years of the initiation of criminal proceedings and be either "related to one another through a common scheme or plan or a shared criminal purpose" or "committed, solicited, requested, importuned, or intentionally aided by persons acting with the mental culpability required for the commission of the criminal acts and associated with or in an enterprise involved in those activities." *Id.*, subd. 6(1)-(3).

The jury found that Gustafson had committed 14 predicate acts, which consist of 11 individually charged offenses and three incidents of theft by swindle that were not individually charged. Gustafson does not challenge the jury's finding that he committed 14 predicate acts. But he contends that the 14 predicate acts are not sufficiently related to

one another to constitute a pattern of criminal activity. He acknowledges that members of the BDP were responsible for the terroristic-threats offense and the kidnapping offense. But he contends that the evidence does not establish that members of the BDP also were responsible for the three controlled-substance offenses, the two firearms offenses, or the seven theft-by-swindle incidents. In short, Gustafson contends that the number of criminal acts connected to the BDP enterprise is fewer than three and, thus, too few to constitute a pattern of criminal activity.

It is sufficient for purposes of this case to focus on the evidence of theft by swindle. Four such offenses were pleaded in the complaint, and the state sought to prove three additional incidents that were not individually charged. The state introduced evidence that Gustafson orchestrated transactions that were designed to swindle mortgage-loan proceeds from banks and mortgage-lending companies using properties that he or his father owned or in which they had some interest. The state introduced evidence that four straw buyers purchased seven properties using cash down payments and mortgage loan proceeds. The state introduced evidence that the straw buyers received the down-payment money from Gustafson, Gustafson's grandfather, or Gustafson's Bail Bonds, Inc. (GBBI), a family-owned business. The evidence also showed that the straw buyers qualified for the mortgage loans by using false employment and income information and that a relative, T.A., who was a mortgage broker, assisted the straw buyers in applying for and obtaining the loans. The state introduced evidence that either Gustafson or his father received most of the proceeds after every transaction.

After the properties were acquired, two were destroyed by fire, and four were sold in foreclosure sales after defaults.

Gustafson contends that his participation in these mortgage-related transactions was entirely separate from other activities of BDP. But the evidence shows that Gustafson acted in concert with his father, his grandfather, T.A., GBBI, and the straw buyers to carry out the seven incidents of theft by swindle. By themselves, those seven incidents constitute a pattern of criminal activity. Thus, viewing the evidence in the light most favorable to the conviction, the evidence is sufficient to allow a jury to reasonably conclude that Gustafson participated in a pattern of criminal activity on behalf of an enterprise. Therefore, the evidence is sufficient to support the conviction of racketeering.

II. Evidentiary Rulings

Gustafson argues that the district court erred by admitting evidence of criminal conduct for which he had not been charged. This court applies an abuse-of-discretion standard of review to a district court's evidentiary rulings. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

As a general rule, evidence connecting a defendant with other crimes or bad acts for which he is not on trial is inadmissible. *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). If such evidence is to be admitted, certain procedural safeguards must be taken: the state must, among other things, give notice of its intent to offer the evidence and prove the defendant's participation in the other crime or bad act by clear and convincing evidence. *See* Minn. R. Evid. 404(b).

Notwithstanding the above-described rules, immediate-episode evidence is admissible as an exception to the *Spreigl* rule and the requirements of rule 404(b). *State v. Riddley*, 776 N.W.2d 419, 424-25 (Minn. 2009). Under this exception, "The state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962). "[W]here two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae, it is admissible." *Id.* Immediate-episode evidence is admissible despite the general prohibition of rule 404(b) because the rule applies only to extrinsic evidence, not to evidence that is intrinsic to the charged offense. *See State v. Hollins*, 765 N.W.2d 125, 131-32 (Minn. App. 2009). The immediate-episode exception applies to a prosecution for racketeering by allowing the introduction of evidence that "is inextricably intertwined as an integral part of the immediate context of the crime charged." *United States v. Rolett*, 151 F.3d 787, 791 (8th Cir. 1998).

Gustafson argues that the district court erred by admitting two types of evidence pursuant to the immediate-episode exception. First, Gustafson challenges the admission of evidence that BDP members engaged in general hooliganism. The district court admitted testimony of a BDP member that the BDP was a gang, led by Gustafson and his father, which "[s]trong-armed people" and "got high and terrorized the town." The district court also admitted testimony of two other BDP members that group members

beat people and that Gustafson sent group members on "missions" to "get stuff from people" without their consent. As an example, the two BDP members described an incident in which they robbed and beat a person at Gustafson's request. The district court ruled that the state could use this evidence to prove the existence of an enterprise, a necessary element of racketeering.

To establish the offense of racketeering, it was necessary for the state to prove that the BDP was an enterprise with a common criminal purpose and a decision-making structure. *See Huynh*, 519 N.W.2d at 196. The testimony at issue reflects the BDP's common criminal purpose and hierarchy. The state is permitted to introduce such evidence, even though the evidence also revealed that Gustafson had engaged in bad acts for which he was not on trial. *See Wofford*, 262 Minn. at 118, 114 N.W.2d at 271.

Second, Gustafson challenges the admission of evidence concerning the three uncharged crimes of theft by swindle. The district court ruled that the state could introduce this evidence to prove the existence of a pattern of criminal activity, another necessary element of racketeering. To establish the offense of racketeering, it was necessary for the state to prove that Gustafson engaged in a pattern of criminal activity, which consists of at least three related criminal acts committed within 10 years of the commencement of criminal proceedings. *See* Minn. Stat. § 609.902, subd. 6. As explained above in part I, the challenged evidence is relevant to the elements of racketeering. *See United States v. Swinton*, 75 F.3d 374, 377-80 (8th Cir. 1996) (affirming admission of intrinsic evidence in prosecution of lending fraud).

Thus, the district court did not err by admitting evidence under the immediate-episode exception.

III. Severity Level

Gustafson argues that the district court erred by assigning a severity level of X to his racketeering conviction for purposes of sentencing.

Under the Minnesota Sentencing Guidelines,[1] the presumptive sentence for an offender is determined by locating the appropriate cell on a sentencing grid on which the vertical axis represents the severity level of the offense and the horizontal axis represents the offender's criminal history. *See* Minn. Sent. Guidelines II, IV (2008). The sentencing guidelines assign most offenses a severity level of between I and XI. *See* Minn. Sent. Guidelines V (2008). But certain offenses, including racketeering, are not ranked "because prosecutions for these offenses are rarely initiated, because the offense covers a wide range of underlying conduct, or because the offense is new and the severity of a typical offense cannot yet be determined." Minn. Sent. Guidelines II.A & cmt. II.A.04 (2008). "When unranked offenses are being sentenced, the 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." Minn. Sent. Guidelines II.A. The supreme court has articulated four factors that sentencing courts should consider when assigning a severity level to an unranked offense:

[1]We are applying the 2008 Minnesota Sentencing Guidelines because the racketeering charge for which Gustafson was sentenced involved predicate offenses that took place between May 18, 2005 and April 27, 2009. *See* Minn. Sent. Guidelines II.A (2008); *State v. Murray*, 495 N.W.2d 412, 413 (Minn. 1993).

> [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.

State v. Kenard, 606 N.W.2d 440, 443 (Minn. 2000); *see also* Minn. Sent. Guidelines cmt. II.A.04 (identifying factors). "No single factor is controlling nor is the list of factors meant to be exhaustive." *Kenard*, 606 N.W.2d at 443. Accordingly, this court applies an abuse-of-discretion standard of review to a sentencing court's assignment of a severity level to an unranked offense. *See id*. at 442.

The sentencing guidelines do not assign a severity level to racketeering. Minn. Sent. Guidelines V. By statute, racketeering is punishable by imprisonment for not more than 20 years, a fine of not more than $1,000,000, or both. Minn. Stat. § 609.904, subd. 1 (2008). This court previously has stated that "the Minnesota Legislature has declared by its criminal penalty provisions, that, short of murder, racketeering and higher-degree drug crimes are the most serious offenses." *State v. Kujak*, 639 N.W.2d 878, 885 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002).

In this case, the district court assigned a severity level of X for purposes of imposing a sentence on Gustafson for the racketeering conviction. The district court appropriately analyzed the *Kenard* factors in doing so. With respect to the first factor, the district court considered the evidence of Gustafson's underlying conduct, which shows that he was a leader of a criminal enterprise and directed others to engage in numerous crimes over a period of time. These crimes consisted of kidnapping, terroristic

threats, three sales of cocaine, two incidents of prohibited possession of a firearm, and seven incidents of theft through a mortgage-fraud scheme. The district court determined that "[t]he conduct proven at trial was severe."

With respect to the second factor, there does not appear to be a ranked offense that is similar to racketeering. Accordingly, the district court appropriately considered the severity levels assigned to the offenses that constituted the 14 predicate acts in this case. The predicate acts consisted of terroristic threats (severity level IV); kidnapping (severity level VI); first-degree sale of a controlled substance (severity level IX); two incidents of third-degree sale of a controlled substance (severity level VI); two incidents of possession of a firearm by a prohibited person (severity level VI); and seven incidents of theft of over $35,000 (severity level VI). The district court determined that racketeering "should be assigned a higher severity level than the severity level assigned to any of the predicate criminal acts."

With respect to the third factor, the district court pointed out that severity levels of IX and X have previously been used for racketeering offenses that involved mortgage-fraud schemes like the one that Gustafson orchestrated. And with respect to the fourth factor, the district court noted that Gustafson's father also was convicted of racketeering and that his conviction was assigned a severity level of X.

The district court properly analyzed the relevant factors and stated its reasoning on the record when it assigned a severity level of X to Gustafson's racketeering conviction. The district court did not abuse its discretion in doing so.

IV. Criminal History Score

Gustafson argues that the district court erred in calculating his criminal history score. Gustafson did not challenge the calculation of his criminal history score at the time of sentencing. But the supreme court has held that a sentence based on an incorrect criminal history score is an illegal sentence that may be corrected at any time such that "a defendant may not waive review of his criminal history score calculation." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). This court applies an abuse-of-discretion standard of review to a district court's determination of a defendant's criminal history score. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

When determining a criminal history score, "[o]nly the two offenses at the highest severity levels are considered for prior multiple sentences arising out of a single course of conduct in which there were multiple victims." Minn. Sent. Guidelines II.B.1.d (2008). The sentencing guidelines do not define the phrase "a single course of conduct." A comment provides an example: if a person robs a crowded store, the offender could be convicted of and sentenced for the robbery and one count of assault for each person in the store at the time of the robbery. Minn. Sent. Guidelines cmt. II.B.108 (2008). This court previously has stated that the two-point limitation "is intended to apply only to a situation in which a crime or crimes are committed against multiple victims during the course of an incident *which is limited in time and place*." *State v. Parr*, 414 N.W.2d 776, 780 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988).

Gustafson contends that the district court erroneously considered two prior convictions of assault and a prior conviction of motor-vehicle theft when calculating his criminal history score because the three convictions arose out of a single course of conduct. Our opinion in the prior case describes an incident outside of a Minneapolis bar as it was closing. *See State v. Gustafson*, No. C6-98-1026, 1999 WL 203780, at *1 (Minn. App. Apr. 13, 1999). The opinion explains that Gustafson approached two men and wielded a knife toward them, but the opinion does not provide any detailed information concerning a theft of a motor vehicle. *Id.* at *2.

The record before this court on this appeal does not contain any additional information regarding these prior convictions. This court does not have sufficient information from which to determine whether the three prior convictions arose out of a single course of conduct. Thus, we cannot determine whether the district court erred in calculating Gustafson's criminal history score. Therefore, we reverse and remand to the district court for further consideration of this issue.

V. *Pro Se* Arguments

Gustafson filed a *pro se* supplemental brief in which he raises numerous additional issues.

First, Gustafson argues that the state violated his right to due process by charging him with additional crimes after he had posted bail on two charges. The record does not reflect that the state amended the complaint to add charges. Furthermore, Gustafson cites no authority to support his proposition that the state could not amend the complaint. *See*

State v. Bluhm, 460 N.W.2d 22, 24 (Minn. 1990) (stating that, before trial, district court may freely permit amendment of complaint to charge additional offenses).

Second, Gustafson argues that he received ineffective assistance of counsel at trial because his attorneys (1) declined to request the removal of the assigned district court judge, (2) declined to strike a member of the jury, (3) refused to object to evidence on the basis of authenticity, (4) did not call certain witnesses to testify, (5) did not pose certain questions to witnesses, and (6) handled motions and court filings incorrectly. All of these claims concern matters of trial strategy, *see Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004), and none of them indicate representation below an objective standard of reasonableness, *see Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

Third, Gustafson argues that the state did not disclose all of its evidence in a timely manner. Gustafson does not describe with specificity the evidence that was not provided to him or explain how he was prejudiced by non-disclosure.

Fourth, Gustafson argues that one of the state's witnesses testified falsely, that the prosecutor knew or should have known of the falsehood, and that the prosecutor failed to correct the testimony. The portion of the trial transcript that Gustafson cites for this proposition does not support his argument.

Fifth, Gustafson argues that the police acted in bad faith by creating, destroying, and altering evidence and by failing to conduct a thorough investigation. But Gustafson provides no specifics to support these general assertions.

Sixth, Gustafson contends that the state violated his Sixth Amendment right to confront his accusers by not calling employees of banks and mortgage companies to testify about the incidents of theft by swindle. The Confrontation Clause of the Sixth Amendment gives a defendant the right to confront and cross-examine witnesses who have made testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374 (2004). Gustafson does not identify any testimonial statements by representatives of banks or mortgage companies that were used against him. In fact, it appears that Gustafson is challenging the fact that no such witness appeared at trial. The Sixth Amendment does not confer a right on a defendant to compel the state to call any particular person as a witness.

Seventh, Gustafson argues that the prosecutor engaged in misconduct that inflamed the passions and prejudices of the jury by comparing him to notorious criminals. During closing arguments, the prosecutor stated that GBBI's building was modest and "perhaps fitting for a Minnesota crime family, you know, this isn't Vito Corleone, this isn't Bernie Madoff." The supreme court has stated that "[n]o purpose is served by comparing [a defendant] to another charged with a notorious crime other than to attempt to impassion the jury . . . ." *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998). "The prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Even if the comments identified above were made in error, the comments are harmless in light of the extent of the evidence presented.

Affirmed in part, reversed in part, and remanded.