STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2345
A13-0143

State of Minnesota,
Respondent,

vs.

Donald Allen Ellis,
Appellant.

Filed May 12, 2014
Affirmed
Kirk, Judge

Hennepin County District Court
File Nos. 27-CR-12-5199, 27-CR-10-28303

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellant challenges his convictions and 336-month sentence for two felony counts of aiding and abetting identity theft based on the jury's findings that he is a career offender and acted with a group of three or more participants. We affirm appellant's convictions and reject his arguments that the district court erred by: (1) imposing a double upward departure and consecutive sentence; (2) denying his motion to dismiss one count of felony identity theft; (3) allowing police investigators to testify about how they developed appellant as a suspect; (4) denying appellant's request for a mistrial due to improper witness testimony; (5) allowing a detective to testify about an Eighth Circuit Court of Appeals opinion documenting his 1983 federal felony conviction; and (6) admitting several probable cause complaints into evidence during the *Blakely* trial to establish that appellant is a career offender. We also conclude the issues raised in appellant's pro se brief have no merit.

FACTS

After a ten-day jury trial in August and September 2012, a jury found appellant Donald Allen Ellis guilty of two felony counts of aiding and abetting identity theft involving eight or more direct victims, in violation of Minn. Stat. §§ 609.05, .527, subds. 2, 3(5) (2008). From October 2009 through February 2010, appellant was the ringleader of a prolific identity-theft ring that used stolen credit cards and checks to purchase high-dollar items at several retail stores throughout the Twin Cities. Appellant and his accomplices prowled parking lots, broke into unattended vehicles, and stole personal

items such as purses, wallets, and briefcases. Using the stolen credit cards and checks, appellant instructed his accomplices to purchase specific electronic items and gift cards that would later be sold to a middleman. Appellant misappropriated the personal identifying information of the victims by creating falsified driver's license renewal forms that his accomplices would use to impersonate the victims during financial transactions. Appellant also used the stolen credit cards to purchase items for his personal use. During the jury trial, 30 police officers and investigators from 16 metropolitan communities and 21 victims testified about the identity-theft crimes. Three of appellant's accomplices also testified at the trial.

Following the guilty verdict, the district court held a jury trial under *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537-38 (2004), to determine any aggravated sentencing factors. The jury found beyond a reasonable doubt that appellant was a career offender and acted as part of a group of three or more participants in both offenses. *See* Minn. Stat. § 609.1095, subd. 4 (2008); Minn. Sent. Guidelines II.D.2.b(9), (10) (2008).

For the first identity-theft conviction (count one), the district court doubled appellant's presumptive sentence of 92 to 129 months to the statutory maximum of 240 months, reasoning that the sentence was supported by the jury's findings on both aggravating factors. Appellant's presumptive sentence was based on an offense severity level of eight and a criminal-history score of seven. *See* Minn. Sent. Guidelines V (2008). The district court also ordered appellant to pay $30,000 in restitution to compensate the victims.

For the second identity-theft conviction (count two), the district court imposed a permissive consecutive sentence of 96 months. This is a double departure from the presumptive middle-of-the-box sentence of 48 months using a criminal-history score of zero. *See* Minn. Sent. Guidelines IV (2008). The district court stated that consecutive sentencing was appropriate in light of the fact that the jury found appellant to be a career offender, but it rejected the jury's finding that appellant was an active participant in the group effort to hide and use the stolen identifications.

This appeal follows.

D E C I S I O N

I. The district court did not err by denying appellant's motion to dismiss count one.

"Statutory construction is a question of law, which this court reviews de novo." *State v. Meyer*, 646 N.W.2d 900, 902 (Minn. App. 2002). Appellant argues that the district court erred when it denied his motion to dismiss the first count of aiding and abetting identity theft, arguing his conduct fit the more specific offense of aiding and abetting financial transaction card fraud. Appellant argues that when two statutes conflict because they require proof of identical elements but have differing penalties, the specific statute controls over the general statute. *See* Minn. Stat. § 609.527, subd. 3(5) (2008) (identity theft); *State v. Craven*, 628 N.W.2d 632, 635 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001); *cf.* Minn. Stat. § 609.821, subd. 3(1)(ii) (2008) (financial transaction card fraud).

The district court denied appellant's motion, stating that the identity theft alleged against appellant involved facts "broader and deeper" than financial transaction card fraud as appellant's conduct included, but was not limited to, burglary, possession of burglary tools, theft, falsification of driver's license identification, and check forgery.

The identity-theft statute provides that "[a] person who transfers, possesses, or uses an identity that is not the person's own, with the intent to commit, aid, or abet any unlawful activity is guilty of identity theft." Minn. Stat. § 609.527, subd. 2. "Identity" is defined as "any name, number, or data transmission that may be used, alone or in conjunction with any other information, to identify a specific individual," including but not limited to a name, social security number, date of birth, driver's license, passport, and unique electronic identification number. Minn. Stat. § 609.527, subd. 1(d) (2008); *see* 10 *Minnesota Practice*, CRIMJIG 16.93 (2006). "Unlawful activity" is defined as "any felony violation of the laws of this state" and "any nonfelony violation of the laws of this state involving theft, theft by swindle, forgery, fraud, or giving false information to a public official." Minn. Stat. § 609.527, subd. 1(g)(1), (2) (2008). In contrast, a person is guilty of financial transaction card fraud if he, "without the consent of the cardholder, and knowing that the cardholder has not given consent, uses or attempts to use a card to obtain the property of another." Minn. Stat. § 609.821, subd. 2(1) (2008); *see also* 10 *Minnesota Practice*, CRIMJIG 16.52 (2006).

A review of the record shows that there was extensive and significant corroborated testimony at trial from appellant's accomplices that appellant broke into vehicles, stole personal items, and created and/or used the identities of the victims to purchase

merchandise at various stores. Appellant's conduct more closely matches the elements of the crime of identity theft.

II. The district court did not abuse its discretion by allowing testimony from investigators about how they developed appellant as a suspect.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "The conviction may stand so long as the admission of the [evidence] was harmless beyond a reasonable doubt." *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997). An error is harmless beyond a reasonable doubt if the jury's verdict is surely unattributable to the erroneous admission of the evidence. *Id.* at 292. In our harmless error impact analysis, this court looks "to the record as a whole." *Id.*

Appellant argues that the district court erred by allowing two police officers and a private fraud investigator to testify that they positively identified him from surveillance videotapes. In a pretrial hearing, the district court ruled that the police officers could not identify appellant from the surveillance video or any still images of the video as it was presented to the jury, but they could explain how the surveillance video was used to identify appellant as a suspect.

Three Rivers Park District Police Officer Charles McCullough testified that he was assigned to investigate the theft of victim D.L.'s purse at the Elm Creek Park Reserve in November 2009. Officer McCullough testified that he gathered video footage from various stores where D.L.'s credit cards were used. The following exchange occurred between appellant's counsel and Officer McCullough during cross-examination:

> [APPELLANT'S COUNSEL]: Sir, in your investigation of this matter, did you have occasion to pull any video showing [appellant] in any connection with . . . the theft or use of [D.L.'s] materials?
>
> [OFFICER MCCULLOUGH]: Yes, I did gather that footage.
>
> [APPELLANT'S COUNSEL]: And so now, let me ask it this way. You've just testified that there was a male and a female, [accomplice D.K.] and a female who you didn't name [pictured on a surveillance video]. And neither one of those people was [appellant]; would you agree with that?
>
> [OFFICER MCCULLOUGH]: I would agree with that, yes, on the first footage I saw. But I've got more footage.

On redirect examination, the prosecutor asked Officer McCullough about other video footage he had viewed, and Officer McCullough responded that he viewed surveillance footage of appellant using a gift card that had been purchased with D.L.'s stolen credit card at a retail store, and that he had developed appellant as a suspect after comparing the video to known photos of appellant.

Over appellant's counsel's objection, the district court ruled that appellant's counsel had opened the door to the testimony when he asked Officer McCullough an open-ended question about the videos he watched during his investigation of the theft of D.L.'s credit cards, and the prosecutor could follow up on that line of questioning.

The district court did not abuse its discretion when it allowed Officer McCullough's testimony about how he came to believe appellant was the individual pictured in the surveillance video. Appellant's counsel opened the door to further questioning about the surveillance tape. *See State v. DeZeler*, 230 Minn. 39, 45, 41 N.W.2d 313, 318 (1950) ("Where one party introduces inadmissible evidence, he cannot

complain if the court permits his opponent in rebuttal to introduce similar inadmissible evidence."). Officer McCullough's statement also provided the jury with context for understanding how he came to believe that appellant was a suspect in the investigation after he compared the photographs and surveillance video. *See State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998) (stating evidence is admissible to give jurors the context for an investigation).

Scott Mahnke, a fraud investigator in the asset protection division of Target Corporation, testified about how he assisted law enforcement in the investigation. Mahnke testified about an exhibit depicting two individuals identified by written text superimposed on video stills from surveillance video footage. The exhibit labeled the two individuals as D.K., one of appellant's accomplices, and appellant. Appellant's counsel objected to the admission of the exhibit, and the district court provided a curative instruction informing the jury that it was up to them to decide who the people were in the surveillance video.

Here, Mahnke's testimony that he prepared the exhibit for law enforcement, including labeling one of the suspects with appellant's name, is inadmissible opinion testimony. *See* Minn. R. Evid. 701 (limiting a lay witness's opinion testimony). But the admission was harmless because appellant's guilt was so overwhelming. Moreover, any potential harm arising from the jury's inference that appellant was the individual in the video was cured by the district court's prompt curative instruction, reiterating that it was up to the jury to determine the identity of the individual in the video. *See State v. Cox*, 322 N.W.2d 555, 559-60 (Minn. 1982).

Maple Grove Police Detective Travis Pobuda testified about his involvement in the investigation. Appellant's counsel asked Detective Pobuda if he would agree that trying to identify someone you have not seen in person from a grainy video "is somewhat a guessing game." Detective Pobuda replied, "No." On redirect, the prosecutor asked Detective Pobuda why it was not "a guessing game" to identify someone from a video. Detective Pobuda replied that the video was submitted and forwarded to other detectives throughout Minnesota, and "people who already had dealings with [appellant] immediately identified him." Detective Pobuda also stated that he compared appellant's driver's license photograph with prior arrest photographs and was able to make a positive identification. In response to appellant's counsel's objection, the district court instructed the jury to disregard the word "immediately" and "positive identification" during Detective Pobuda's testimony. The district court reminded the jury that "[t]he terminology regarding 'positive identification,' as I told you earlier in the trial, it's your decision who is in the videos and stills that you have seen."

Appellant's counsel opened the door to the prosecutor's questioning about how Detective Pobuda developed appellant as a suspect from the surveillance video. *See DeZeler*, 230 Minn. at 45, 41 N.W.2d at 318. Moreover, Detective Pobuda's comments do not rise to reversible error because it is unlikely that his remarks would affect the verdict when the evidence was so overwhelming as to appellant's guilt, and the district court provided a curative instruction in both instances. *See Cox*, 322 N.W.2d at 559-60.

III. The district court did not abuse its discretion when it denied appellant's request for a mistrial due to improper witness testimony.

"Evidence of another crime, wrong, or act is inadmissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b); *see State v. Moorman*, 505 N.W.2d 593, 600 (Minn. 1993). This court reviews a district court's admission of bad-act evidence for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). When "a reference to a defendant's prior record is of a passing nature, or [when] the evidence of guilt is overwhelming, a new trial is not warranted because it is extremely unlikely that the evidence in question played a significant role in persuading the jury to convict." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quotations omitted). "If there is a reasonable possibility that the verdict might have been favorable to the defendant had the evidence not been allowed, the evidence is prejudicial and its admission is reversible error." *State v. Smith*, 749 N.W.2d 88, 93 (Minn. App. 2008).

Appellant challenges the district court's admission of three instances where witnesses testified about his prior criminal convictions. First, on direct examination, accomplice E.S. testified that a police officer told her "that [appellant] is a lifetime career criminal or something like that." Appellant's counsel moved for a mistrial based on E.S.'s reference to appellant as a "lifetime criminal." The district court denied the motion, noting that E.S.'s comment occurred during her lengthy testimony about her conversation with another inmate, and it did not carry the same kind of weight as a police officer saying appellant is a career offender. After reviewing the record, we conclude

that the district court did not err when it denied appellant's counsel's motion for a mistrial based on E.S.'s comment because it was "of a passing nature" and the district court provided a prompt curative instruction to disregard the phrase "lifetime career criminal." *See Clark*, 486 N.W.2d at 170.

Second, appellant argues that the district court erred when it allowed Minnesota State Patrol Trooper Patrick Miles to testify that he initiated a traffic stop of appellant's vehicle because of a KOPS alert, which is used to notify law enforcement that a suspect might be violent towards law enforcement. While appellant's counsel did not move at trial to strike Trooper Miles's testimony, there was no error in its admission because Trooper Miles did not testify about appellant's criminal past. *See Griller*, 583 N.W.2d at 740 (holding that to warrant reversal when the appellant did not object at trial, there must be (1) error; (2) that is plain; and (3) affects substantial rights).

Finally, appellant argues that the cumulative effect of the testimony of E.S., Detective Pobuda, and Trooper Miles constituted "multiple references" to appellant's "criminal and violent past," thus necessitating a mistrial. We conclude that any errors were harmless because there is no reasonable possibility that the verdict might have been favorable to appellant had the evidence not been allowed. *See Smith*, 749 N.W.2d at 93.

IV. The district court did not abuse its discretion during the *Blakely* trial by allowing a police detective to testify about an Eighth Circuit Court of Appeals opinion documenting appellant's conviction.

The Minnesota Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution apply in jury sentencing trials. *State v. Rodriguez*, 754 N.W.2d 672, 681, 683-84 (Minn. 2008). "Evidentiary rulings rest within

the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *Amos*, 658 N.W.2d at 203. This court reviews a district court's interpretation of statutes and court rules de novo. *Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 518 (Minn. App. 2007). Whether a defendant's confrontation rights have been violated "is a question of law that we review de novo." *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007).

Appellant argues that the admission of a police officer's testimony that he read an opinion from the Eighth Circuit Court of Appeals that addressed appellant's 1983 federal felony convictions for aiding and abetting the possession of firearms and unlawful possession of a firearm was inadmissible hearsay. *See* Minn. R. Evid. 802 (stating hearsay is generally inadmissible).

During the *Blakely* trial, the prosecutor alerted the district court that it was unable to locate a copy of appellant's 1983 federal felony conviction. In order to admit appellant's conviction into the record, Hennepin County Sheriff's Office Detective Bernie Bogenreif testified that he reviewed a 1984 Eighth Circuit Court of Appeals opinion concerning appellant's challenge to his federal felony conviction of unlawful possession of stolen firearms. Detective Bogenreif testified that the opinion stated that appellant was a participant in the sale of nine stolen firearms to undercover officers for the negotiated price of $275. Detective Bogenreif testified that the firearms were stolen during a burglary, and appellant "was sentenced to terms of 2 years and 5 years to run concurrent."

Detective Bogenreif's testimony is admissible under the public records exception to the hearsay rule. Under Minn. R. Evid. 803(8), records and reports in any form compiled by a public office concerning matters observed pursuant to duty imposed by law as to which matters there was a duty to report, are not excluded by the hearsay rule, "unless the sources of information or other circumstances indicate lack of trustworthiness." Here, the Eighth Circuit Court of Appeals had a duty to state the facts surrounding appellant's legal challenge of his federal firearms conviction. Detective Bogenreif's testimony about appellant's conviction was limited to the facts to establish that appellant had been convicted of the unlawful possession of a stolen firearm. There is no evidence in the record to suggest that the Eighth Circuit Court of Appeals opinion or Detective Bogenreif were untrustworthy sources of information. We also note that the court opinion is admissible as a judgment of previous conviction under Minn. R. Evid. 803(22).

V. The district court did not commit plain error when it admitted the probable cause complaints into evidence.

"A hearsay objection at trial is not sufficient to preserve a confrontation clause objection on appeal." *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010). When a defendant fails to object to the admission of evidence at trial, this court reviews the district court's decision to admit the evidence for plain error. *State v. Tscheu*, 758 N.W.2d 758 N.W.2d 849, 863 (Minn. 2008); *Griller*, 583 N.W.2d at 740.

Appellant argues that the admission of the probable cause complaints at the *Blakely* trial to prove that his current offenses were committed as a pattern of criminal

conduct under the career-offender statute were inadmissible hearsay and violated his rights under the Confrontation Clause. At the time this evidence was offered, appellant objected to the admission of this evidence for lack of foundation, but he did not raise an objection on Confrontation Clause grounds.

The state introduced evidence of twelve prior convictions, including the probable cause complaints, to prove that appellant's two felony identity-theft convictions were committed as a part of a pattern of criminal conduct as required by the career-offender statute.

The state submitted evidence of appellant's convictions of: (1) aggravated forgery; (2) aiding and abetting unlawful possession of a firearm; (3) counseling others to receive firearms; (4) counseling with others engaging in the business of dealing firearms without a license; (5) offering a forged check; (6) selling cocaine; (7) check forgery; (8) identity theft; (9) forgery; (10) check forgery; (11) possession or sale of stolen or counterfeit checks; and (12) theft by swindle. The state concedes that the district court erred by admitting the probable cause complaints, but argues that any hearsay or confrontation errors due to their admission are harmless.

Appellant has a heavy burden to show that the admission of the probable cause complaints constitutes prejudicial error. *State v. McClenton*, 781 N.W.2d 181, 195 (Minn. App. 2010) (quoting *Griller*, 583 N.W.2d at 741), *review denied* (Minn. June 29, 2010). A review of the record shows that appellant admitted to the underlying facts alleged in the complaints in the cases that resulted in his convictions of sale of cocaine, offering a forged check, and aggravated forgery. The state also submitted the petitions to

enter a guilty plea for all of the felony convictions except for the 1983 federal convictions. Moreover, the record also reflects that it is very likely that the jury would have concluded that appellant was a career offender despite the erroneous admission of the probable cause complaints. Appellant's 29-year criminal record provides a sufficient factual basis to establish that his present convictions were part of a pattern of theft-related criminal conduct. Appellant fails to meet his burden in showing he was prejudiced by the erroneous admission of the probable cause complaints.

VI. The district court did not abuse its discretion by departing from the presumptive sentence and imposing a 336-month sentence.

Statutory interpretation is a question of law that we review de novo. *State v. Engle*, 743 N.W.2d 592, 593 (Minn. 2008). "We review a sentencing court's departure from the sentencing guidelines for abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). If the reasons given for the "departure are legally permissible and factually supported in the record," we will affirm the departure. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

A. The district court did not abuse its discretion when it imposed a double departure on a consecutive sentence.

Appellant argues that the district court abused its discretion when it imposed an upward durational departure and consecutive sentence because it (1) did not cite the grounds for departure; (2) used the same aggravating factors to justify an upward departure on both counts; and (3) sentenced appellant to 336 months in prison, which exaggerates the criminality of his conduct.

The district court did not err when it imposed an upward durational consecutive sentence. When a defendant has "[m]ultiple current felony convictions" for certain crimes and the presumptive disposition for the offenses is commitment to the commissioner of corrections, consecutive sentencing is permissive without departure from the sentencing guidelines. Minn. Sent. Guidelines II.F.2.b (2008). Here, the presumptive duration for both of appellant's convictions was commitment to the commissioner of corrections because identity theft involving eight or more persons is a severity-level eight offense. Minn. Sent. Guidelines V. Consecutive sentencing was permissive and did not require findings on aggravating factors. Appellant contends that the district court erred when it durationally departed on both counts without citing departure grounds under Minn. Sent. Guidelines II.F (2008). But this section does not apply in this case because the offenses do not involve a single victim and a single course of conduct.

Appellant next argues that under *State v. Williams*, the district court erred when it used his career-offender status to justify departing on both sentences. 608 N.W.2d 837 (Minn. 2000). Appellant misconstrues the holding of *Williams.* In *Williams*, the appellant was convicted of several crimes, including first-degree criminal sexual conduct and attempted first-degree murder. *Id.* at 839. The Minnesota Supreme Court noted that it was concerned that the district court did not provide separate justifications for each sentence in part because the "factors supporting departure on one sentence *may* not justify a departure on another sentence." *Id.* at 841 (emphasis added). The court explained that the victim's vulnerability due to the fact she was asleep when appellant

entered her apartment supported a departure on the criminal sexual conduct sentence, but it did not justify a departure on the attempted murder sentence because the victim was awake at the time of that offense. *Id.* Here, the record reflects that the district court properly identified the aggravating factors, including appellant's career-offender status, to support a departure on each sentence.

Appellant argues that the 336-month sentence exaggerates the criminality of his conduct as his sentence is significantly longer than comparable sentences for identity-theft offenses. In support of his position, appellant cites two cases, *State v. Ross*, 732 N.W.2d 274 (Minn. 2007), and *Anderson v. State*, 794 N.W.2d 137 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011), which both involved identity-theft convictions with more than eight direct victims. In *Ross*, the district court convicted the appellant for his role in an identity-theft scheme involving the stolen identities of over 30 people, and sentenced him to 23 months for identity theft, and 26 months each for two counts of theft by swindle, to be served concurrently. 732 N.W.2d at 276-77. In *Anderson*, the district court sentenced the appellant to 50 months for aiding and abetting identity theft of 28 victims. 794 N.W.2d at 138-39.

The issue before this court is whether the length of appellant's sentence reflects the "court's collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts." *State v. Norton*, 328 N.W.2d 142, 146-47 (Minn. 1982). An appellate court may consider "comparable sentences in departure cases to determine if a sentence is unjustifiably disparate. But for a sentence to be comparable, the sentencing departure must be based upon the same or similar reasons." *Vickla v.*

State, 793 N.W.2d 265, 270 (Minn. 2011). The sentences imposed in *Ross* and *Anderson* are not comparable to this case because they do not involve upward durational departures based on status as a career offender or committing the offense as part of a group of three or more persons. *See id*.

Appellant's sentence is well-reasoned and supported by the record. The district court noted that appellant was a career offender who committed major offenses with wide, sweeping impact on the victims. The district court recognized that appellant demonstrated a lifetime of illegal behavior related to using the financial resources and documentation of others to unlawfully obtain property, and for decades appellant had committed felonies when he was not in custody. The sentence imposed is not unreasonable, or excessive, and it does not exaggerate the criminality of appellant's conduct.

Appellant next argues that the state should have aggregated the two identity-theft offenses into one felony count under Minn. Stat. § 609.527, subd. 7 (2008), because they occurred within a six-month period. Appellant contends that the state circumvented the 20-year statutory cap on identity theft by prosecuting him for two separate offenses. Appellant requests that this court reduce his sentence to 120 months for the first conviction and 48 months on the second conviction, to be served consecutively, for a total of 168 months. But a prosecutor has broad discretion in the exercise of the charging function under the separation-of-powers doctrine. *State v. Strok*, 786 N.W.2d 297, 302-03 (Minn. App. 2010). A court should not interfere with the prosecutor's exercise of that discretion except in exceptional circumstances. *See State v. Lee*, 706 N.W.2d 491,

495-96 (Minn. 2005). Here, there is no evidence that the prosecutor clearly abused his or her charging discretion. *See id.* Appellant has not shown any exceptional circumstances exist that warrant our interference with the prosecutor's exercise of discretion in charging and prosecuting appellant for two separate offenses rather than one.

B. The state proved aggravating factors beyond a reasonable doubt.

Departures from presumptive sentences are reviewed under an abuse of discretion standard, but there must be "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996).

> [A] pattern of criminal conduct may be demonstrated by reference to past felony or gross misdemeanor convictions or by proof, through clear and convincing evidence, of prior, uncharged acts of criminal conduct, where such acts are similar to the present offense in motive, purpose, results, participants, victims or other characteristics.

State v. Gorman, 546 N.W.2d 5, 9 (Minn. 1996) (quotation omitted).

Appellant argues that the state failed to prove that his crimes were committed as part of a pattern of theft-related criminal conduct because his 1983 federal felony firearm conviction was not similar to his previous forgery convictions. A pattern of criminal conduct under the career-offender statute is broadly construed. *See State v. Simmons*, 646 N.W.2d 564, 569 (Minn. App. 2002) (holding that defendant's 16 felony convictions, including controlled substance crimes, receiving stolen property, robbery, check forgery, burglary, and unauthorized use of a motor vehicle constituted a pattern of criminal conduct), *review denied* (Minn. Sept. 17, 2002). Appellant's 1983 conviction was a theft-

related crime and is consistent with the general pattern of theft-related criminal conduct established by his five prior felony convictions.

The career-offender statute allows the district court to depart if it finds that a defendant has five prior sequential felony convictions. Minn. Stat. § 609.1095, subd. 4; *see State v. Huston*, 616 N.W.2d 282, 283 (Minn. App. 2000). The state argues that appellant's previous convictions establish a pattern of theft-related criminal conduct, and appellant's 1983 federal felony conviction fits this pattern because it involved the sale of a stolen firearm. At trial, the state offered evidence of appellant's five felony convictions arising from eight separate incidents: (1) aggravated forgery; (2) sale of a stolen firearm; (3) offering forged checks and sale of cocaine; (4) attempted check forgery and conspiracy to commit check forgery; and (5) check forgery, theft by swindle, and offering a forged check.

Appellant next argues that the state failed to prove beyond a reasonable doubt that he was part of a group of three or more persons who all actively participated in the crime in the first count. Appellant does not cite to any caselaw to support his position. At sentencing, the district court used the jury's factual determination that appellant committed the crime as a group of three or more persons to support its reasoning for the sentencing departure.

The trial record shows that while appellant was a part of a group of three or more people actively participating within the identity-theft ring, he had a tendency of working with only one other accomplice when committing each offense. But it is clear from the record that appellant was the common denominator in all of the identity-theft crimes.

Moreover, the three-or-more-persons aggravating factor does not preclude instances where a group of three persons all actively participate in a crime, but do not participate together *at the same time*. Minn. Sent. Guidelines II.D.2(b)(10). Therefore, the district court did not abuse its discretion when it used the jury's finding on this aggravating factor to support an upward durational departure.

VII. Appellant's pro se supplemental brief does not raise any issues of merit.

In his pro se supplemental brief, appellant raises 12 arguments, many of which were raised by his counsel in her brief. Of the remaining arguments, appellant contends that the district court abused its discretion because it could not authenticate the chain of custody of Mahnke's collection and presentation of surveillance video from Target. A review of the record shows that the district court did not abuse its discretion when it admitted the surveillance video. Mahnke testified at length about how he routinely works with law enforcement as part of his job in investigating crimes such as identity theft. Mahnke also testified how he systematically pulled surveillance videos based on the time and date of the point of origination of the sale of the stolen merchandise.

Appellant next argues that the prosecutor did not disclose the evidence of his five prior felony convictions to his counsel until the day of the *Blakely* hearing, and the prosecutor did not provide the correct offense dates. But the state filed notice about the particular convictions it intended to use to seek the career offender upward departure on October 28, 2011, which was almost one year before the trial. We also note that the state

properly submitted evidence of the felony convictions substantiating the date of each offense. Appellant's remaining arguments are without merit.

Affirmed.