STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0311

State of Minnesota,
Respondent,

vs.

Donald Allen Ellis,
Appellant.

Filed December 26, 2017
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CR-10-28303

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

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

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant Donald Allen Ellis appeals from the district court's order denying, in part, his motion for corrected sentence under Minn. R. Crim. P. 27.03, subd. 9. In sentencing Ellis for felony identity theft, the district court had initially imposed a double upward

departure based on two aggravating factors, both of which were found by a jury: (1) Ellis was a career offender and (2) he committed the offense as part of a group of three or more participants. Ellis moved to correct his sentence after it became clear that, under an intervening Minnesota Supreme Court decision, he did not qualify as a career offender. The district court decided that the second aggravating factor alone justified the double upward departure and reaffirmed the sentence.

Ellis argues that the jury's factual finding on the second aggravating factor and the district court's sentencing decision were both "tainted" by the erroneous admission of evidence of prior convictions to prove his career-offender status. He also argues that his double upward departure is no longer justified in the absence of the career-offender factor. Because admitting the prior convictions was not reversible plain error and the district court's affirmation of the upward departure based on the aggravating factor of committing the offense as part of a group of three or more participants was not an abuse of discretion, we affirm.

FACTS

In 2012, following a ten-day jury trial, Ellis was convicted of two counts of aiding and abetting felony identity theft in violation of Minn. Stat. § 609.527, subd. 2 (2008). These convictions span separate time periods between October 2009 and February 2010.

A *Blakely* trial[1] was held subsequent to Ellis's convictions to determine whether any aggravating sentencing factors existed that could support an upward departure. The state argued that two factors existed. First, the state argued that Ellis was a career offender under Minn. Stat. § 609.1095, subd. 4 (2008); the state introduced evidence of his past convictions to support that factor. *See* Minn. Sent. Guidelines II.D.2.b(9) (2008) (identifying career-offender status as an aggravating factor). Second, the state argued that Ellis had committed the crimes as part of a group of three or more persons who all actively participated; the state relied on trial testimony to establish that factor. *See id.* at II.D.2.b(10). The *Blakely* jury found beyond a reasonable doubt that Ellis (1) was a career offender and (2) acted as part of a group of three or more participants in both offenses.

The district court sentenced Ellis to a total of 336 months in prison for the two convictions. For count one, the court increased Ellis's presumptive sentence of 95 to 132 months' imprisonment to the statutory maximum of 240 months (20 years), reasoning that the sentence was supported by the jury's findings on both aggravating factors. For count two, the district court imposed a permissive consecutive sentence of 96 months, which represented a double upward departure from the presumptive 48-month sentence. For this count, the district court relied exclusively on the finding that Ellis was a career offender, rejecting the jury's finding that Ellis was an active participant in a group effort for the time period of that conviction.

[1] Following the guilt phase, a *Blakely* trial is held for the jury to determine whether the state has proved beyond a reasonable doubt the existence of any aggravating factors. *See Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537-38 (2004).

Following Ellis's unsuccessful appeal of his convictions and sentences to this court,[2] in 2015, the Minnesota Supreme Court held that a felony conviction sentenced as a stay of imposition and ultimately reduced to a misdemeanor by operation of law does not qualify as a prior felony conviction for purposes of Minnesota's career-offender statute. *State v. Franklin*, 861 N.W.2d 67, 70 (Minn. 2015). Ellis filed a motion for sentence correction under Minn. R. Crim. P. 27.03, subd. 9, arguing that, under *Franklin*, one of his prior convictions did not qualify as a prior felony conviction and, without it, he was not a career offender.

The district court granted a limited evidentiary hearing to determine if *Franklin* impacted Ellis's sentence. The court determined that, in the wake of *Franklin*, Ellis's 1976 forgery conviction was deemed a misdemeanor pursuant to Minn. Stat. § 609.13, subd. 1(2) (2008), thereby reducing his total felony convictions to four, one below the requisite number to qualify as a career criminal. Because Ellis's count-two sentencing departure had been based exclusively on his status as a career offender, the district court granted Ellis's motion for resentencing on count two. At a later resentencing hearing, the district court sentenced Ellis to the presumptive 48 months for count two.

Ellis argued that *Franklin* required the court to also vacate his sentence on count one because the inaccurate information the judge and jury heard regarding his offender status "call[ed] into question the entire sentence that [Ellis] received in this case." The district court disagreed, concluding that the upward departure on count one was still

[2] *State v. Ellis*, Nos. A12-2345, A13-0143, 2014 WL 1875489 (Minn. App. May 12, 2014), *review denied* (Minn. Aug. 5, 2014).

justified on the basis of the remaining three-or-more-participants aggravating factor. At the later resentencing hearing on count two, Ellis renewed his argument about his count-one sentence. The court again rejected it, explaining:

> With regard to the argument that the jury was corrupted by hearing the phrase "career offender" and seeing the prior convictions, I am finding that the other upward departure basis was so different as to not be affected by . . . your criminal history, and so I'm standing by my written order that count one is not affected by the *Franklin* decision that . . . is forcing resentencing on count two.

Accordingly, the district court denied Ellis's request for a new *Blakely* trial and affirmed his 20-year sentence on count one.

Ellis appeals.

D E C I S I O N

I. The district court did not err in reaffirming Ellis's count-one sentence.

Ellis makes two arguments regarding his enhanced sentence on count one. First, he argues that admission of evidence of his prior convictions was plain error and so tainted the sentencing jury that he is entitled to a new *Blakely* trial. Second, he argues that, even if the *Blakely* jury was not affected by the prior-conviction evidence, the sentencing court was, and his enhanced sentence was an abuse of discretion. We address each argument in turn.

A. Admission of prior convictions at the *Blakely* trial was not reversible plain error.

Ellis argues that "[t]he sentencing jury was presented with so much evidence of purported prior bad acts that it cannot reasonably be expected to render an accurate

decision" and that, because of this, he is entitled to a new *Blakely* trial "where the jury is presented only with legally allowed evidence."

The Minnesota Rules of Evidence apply to a *Blakely* trial. *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016). When a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). "If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). When the ground for the objection at trial is not the same as that raised on appeal, we review the claim for plain error. *State v. Mosley*, 853 N.W.2d 789, 797 n.2 (Minn. 2014).

Ellis did not object to the introduction of his five felony convictions at the *Blakely* trial on evidentiary grounds. Instead, he objected to the prior-conviction evidence only on the basis of the alleged untimeliness of the state's disclosures. Because he raises a new objection on appeal, we review the admission of the evidence for plain error.

Ellis contends his convictions were inadmissible under Minn. R. Evid. 404(b) because the convictions constituted prior-bad-acts evidence used to show his propensity to commit a crime, and under Minn. R. Evid. 609 because the convictions were not proper impeachment evidence. But the state did not introduce Ellis's convictions to show propensity or to impeach his testimony. The state introduced the convictions to establish

his status as a career offender. The question is whether admission of the evidence for that purpose was plain error.

"A plain error is an error that is clear or obvious at the time of appeal." *Sanchez-Sanchez*, 879 N.W.2d at 330 (quotations omitted). In *Sanchez-Sanchez*, the Minnesota Supreme Court held that, although it was an error not to apply the rules of evidence to a *Blakely* sentencing trial, this error was not "clear or obvious" at the time of appeal because the court just announced the rule. *Id.* at 331 ("Until today, we had never clearly required district courts to apply the rules of evidence in a *Blakely* court trial. Consequently, we cannot say that the district court's unobjected-to failure to apply the rules of evidence in this case constitutes a clear or obvious error."). Consistent with *Sanchez-Sanchez*, we must examine whether it was "clear or obvious" at the time of Ellis's direct appeal that admission of his prior convictions was error.

Ellis's direct appeal was decided by this court on May 12, 2014. Fifteen days later, this court, in a published decision, decided that a "prior felony conviction" under the career-offender statute, Minn. Stat. § 609.1095, subd. 4 (2012), did not include a felony conviction that was deemed to be a misdemeanor under Minn. Stat. § 609.13, subd. 1(2) (2012). *State v. Franklin*, 847 N.W.2d 63, 67-68 (Minn. App. 2014), *aff'd*, 861 N.W.2d 67 (Minn. 2015). Prior to *Franklin*, in cases interpreting the effect of a deemed misdemeanor in other statutory settings, the offense was considered a felony. *See, e.g.*, *State v. Clipper*, 429 N.W.2d 698, 701 (Minn. App. 1988) (concluding that defendant could receive a criminal-history point for a felony conviction for which imposition of sentence was stayed, notwithstanding a statute that provided that felony conviction for burglary on

which imposition of sentence was stayed would appear on defendant's records as misdemeanor). Thus, it was only after Ellis's sentencing and direct appeal that *Franklin* made clear that his 1976 conviction, which was deemed to be a misdemeanor by operation of Minn. Stat. § 609.13, subd. 1(2), was not a felony conviction under the career-offender statute and consequently that introduction of evidence of his prior convictions was improper since he could no longer qualify as a career offender. *See Franklin*, 861 N.W.2d at 70. Accordingly, Ellis has failed to establish the district court's error in admitting the evidence was plain.

Ellis also cannot establish that the error affected his substantial rights. Ellis bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the *Blakely* jury's finding regarding the aggravating factor of three or more participants in the crime. *See State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (describing substantial-rights prong with respect to jury verdict). The evidence regarding the three-or-more-participants factor was presented at the guilt phase of the trial. During that phase, the jury heard extensive evidence that Ellis was "the ringleader of a prolific identity-theft ring that used stolen credit cards and checks to purchase high-dollar items" throughout the Twin Cities. *Ellis*, 2014 WL 1875489, at *1. That evidence demonstrated how Ellis and his accomplices misappropriated their victims' identities. The jury heard from 30 police officers and investigators, 21 victims, and, importantly, three of Ellis's accomplices. The jury found Ellis guilty. *Id.*

At the *Blakely* trial, the jury learned of Ellis's prior convictions for purposes of the career-offender question. Ellis's career-offender status was so factually distinct from the

evidence presented to prove that the crime involved three or more active participants that it is highly unlikely that the jury confused these two issues or improperly used Ellis's prior convictions to help determine that the crime for which he was to be sentenced involved three or more people. Moreover, the jury had already found Ellis guilty, which implies that the jury believed the evidence regarding the ring of accomplices that he led. Therefore, we conclude that the district court's admission of the prior convictions at the *Blakely* trial did not affect Ellis's substantial rights.

Because the plain-error standard is not met with respect to the district court's admission of Ellis's prior felony convictions, Ellis is not entitled to a new *Blakely* trial.

B. The district court did not abuse its discretion in reaffirming the count-one enhanced sentence based solely on the three-or-more-participants aggregating factor.

This court reviews a district court's departure from the sentencing guidelines for abuse of discretion. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). A district court abuses its discretion when its reasons for departure are "improper or inadequate." *Id.* at 156 (quotation omitted). However, a district court may depart from presumptive sentencing guidelines when the record contains "substantial and compelling circumstances" for the departure. *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). The sentencing guidelines provide "a nonexclusive list of factors which may be used as reasons for departure." Minn. Sent. Guidelines II.D.2 (2008).

The district court sentenced Ellis to 20 years on count one, stating on the record that the upward departure was justified because he was a career offender and because three or more people actively participated in the offense. At the evidentiary hearing on Ellis's

motion to correct sentence and again at the resentencing hearing on count two, the district court decided that the aggravating factor of three or more people alone warranted the imposition of a double upward departure on count one.

The *Blakely* jury found that Ellis committed his count-one offense as part of a group of three or more persons who all actively participated in the crime. *See id.* at II.D.2.b(10). Ellis first argues that this factor cannot support a departure because it duplicates an element of the crime. *See State v. Osborne*, 715 N.W.2d 436, 446 (Minn. 2006) ("[E]lements of an offense cannot be used as aggravating factors to impose an upward sentencing departure for that same offense."). However, the crime of aiding and abetting requires only two persons and the departure is grounded in three or more persons participating. We held in a case involving an upward departure for a conspiracy conviction that the three-or-more-participants aggravating factor does not duplicate an element of the offense of conspiracy because only two people are required for a conspiracy. *State v. Ayala-Leyva*, 848 N.W.2d 546, 558 (Minn. App. 2014), *review denied* (Minn. Aug. 5, 2014). For the same reason, the three-or-more-participants factor is not improper here.

Ellis next asserts that the court did not rely solely on the three-or-more-participants factor, but instead impermissibly based its upward departure on his prior convictions. When a district court relies on a combination of proper and improper aggravating factors in making a sentencing decision, "we must determine whether the district court would have imposed the same sentence absent reliance upon the improper aggravating factor." *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) (citing *State v. Rodriguez*, 754 N.W.2d 672, 682 (Minn. 2008)). "In doing so, we consider the weight given to the invalid factor

and whether any remaining factors found by the court independently justify the departure." *Id.* We will affirm the sentence imposed by the district court only if we can conclude from the record that the district court would have imposed the same sentence absent its reliance on the improper aggravating factors. *Id.*

Here, we know what the district court would have done absent the improper factor. At the evidentiary hearing and the resentencing hearing, the district court reconsidered Ellis's count-one sentence based on just the three-or-more-participants factor and concluded that the sentence remained appropriate. Because the record indicates that the district court would have imposed—and in fact effectively did reimpose—the same sentence absent reliance upon the career-offender factor, we need not remand the case to the district court for further determination. *See id.*

Ellis also argues that the fact that three or more persons participated in the crime "does not present the substantial and compelling circumstances necessary to support a double upward departure." An upward departure may be supported by the presence of a single aggravating factor, including the fact that a group of three or more persons participated in the crime. *See State v. Castillo-Alvarez*, 820 N.W.2d 601, 623 (Minn. App. 2012), *aff'd*, 836 N.W.2d 527 (Minn. 2013) (upholding upward departure on three-or-more-participants factor).

Here, the evidence, particularly the testimony from Ellis's various accomplices throughout his trial, supports the jury's finding that three or more persons participated in the identity-theft ring. "If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed." *Hicks*, 864 N.W.2d

at 156 (quotation omitted). Because the three-or-more-participants factor properly supports the departure and the district court would have "imposed the same sentence absent reliance upon the improper aggravating factors," we conclude the district court did not abuse its discretion in affirming Ellis's count-one sentence. *See State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. May 18, 2010).

II. Ellis's pro se claims lack merit.

Ellis raises additional arguments in his pro se supplemental brief. First, he argues that (1) the detective gave "perjured" testimony by telling the jury that Ellis's 1976 conviction was a felony, which "polluted" the *Blakely* trial, and (2) the jury was left with the "false impression" that Ellis had five prior convictions and was a career offender, which violated his due process rights because he was sentenced without accurate information. These "pollution" and "false impression" arguments are redundant of Ellis's "taint" claim, which has been previously addressed and rejected.

Ellis also argues that the state withheld favorable information on his 1976 conviction in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S. Ct. at 1196-97. Three components are necessary for a "true *Brady* violation." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (quotation omitted). "First, the evidence at issue must be favorable to the accused, either because it

is exculpatory or it is impeaching. Second, the evidence must have been suppressed by the state, either willfully or inadvertently. Third, prejudice to the accused must have resulted. All three components must be met in order for a *Brady* violation to be found." *Id.* (citations omitted).

Ellis asserts that the state failed to provide a Bureau of Criminal Apprehension (BCA) report prior to his *Blakely* trial. Presumably the misdemeanor designation of his 1976 conviction on the BCA report is the favorable information withheld. For a violation to have occurred, Ellis must have been prejudiced by the prosecution's lack of disclosure. *Id.* Ellis has shown no such prejudice.

Immediately prior to the *Blakely* trial, and even without having the BCA report, Ellis's attorney agreed that he had sufficient documentation of Ellis's prior convictions to effectively present his case to the jury. Furthermore, the state did not mislead the jury when it presented evidence of this 1976 conviction at the *Blakely* trial. As the district court noted in its original sentencing order, "the evidence presented to the jury clearly stated that the [1976] sentence was a stay of imposition," for which Ellis was sentenced to probation. Finally, even without receiving the report, Ellis should have already known that his 1976 conviction was deemed a misdemeanor after he successfully completed probation; he was specifically instructed during his original sentencing hearing that this would be the disposition.

In sum, the record indicates that Ellis and his attorney understood the nature of his 1976 conviction and had the information necessary to effectively present his defense and

cross-examine the detective. Because Ellis was not prejudiced by the state's failure to provide him with a copy of the BCA report, his *Brady* violation argument lacks merit.

Affirmed.