STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2018

State of Minnesota,
Respondent,

vs.

Larry Darnell Maxwell,
Appellant.

Filed April 26, 2011
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CR-07-124185

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

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

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

Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Connolly, Judge.

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

LANSING, Judge

A jury found Larry Maxwell guilty of racketeering, two counts of identity theft, nine counts of theft by swindle, and six counts of aggravated forgery. On appeal from his conviction and sentence, Maxwell challenges the district court's admission of other-crimes evidence, evidentiary rulings, jury instructions, sentencing determinations, and the sufficiency of the evidence to support the racketeering conviction. In a pro se supplemental brief, Maxwell presents eight additional claims of error. Because we conclude that the district court did not abuse its discretion in its evidentiary and sentencing determinations, the jury instructions did not affect Maxwell's substantial rights, the evidence was sufficient to convict Maxwell of racketeering, and the claims presented in Maxwell's pro se supplemental brief do not provide a basis for reversal, we affirm.

F A C T S

The probable-cause section of the complaint that charged Larry Maxwell with racketeering, identity theft, swindle, and aggravated forgery, describes his involvement in a real-estate mortgage-fraud scheme. The complaint alleges that Maxwell used his association with and control over Realty Executive Advantage Plus Group, a real-estate brokerage business, and Worldlink Mortgage, Inc., a mortgage brokerage business, to fraudulently obtain more than $2,000,000 in mortgage loans by perpetrating identity thefts, forgeries, and thefts by swindle. The complaint also states that Maxwell had

previously pleaded guilty to and was convicted of aiding and abetting the providing of false information in a crime involving real estate.

At trial, a participant in Maxwell's mortgage-fraud scheme testified that he created fake identification documents and gave them to Maxwell who, through his positions at Realty Executives and Worldlink Mortgage, used the fake identity to obtain financing for the fraudulent purchase of four properties between 2005 and 2007. Maxwell met with this participant throughout 2005 and in 2006 to talk about purchasing real estate with the fake identity. Maxwell paid the participant for his role in purchasing each property. Additional testimony established that Maxwell used the fraudulently obtained loan proceeds to pay off fake third mortgages held in his assistant's name and his wife's company's name. The state introduced Maxwell's prior conviction for a crime involving real estate as *Spreigl* evidence to show a common scheme or plan.

A jury convicted Maxwell on all eighteen counts. The district court assigned the racketeering conviction a severity level X and sentenced Maxwell to prison for 198 months, which was at the top end of the presumptive range.

Maxwell now appeals, arguing the district court (1) abused its discretion when it admitted his prior conviction as *Spreigl* evidence; (2) abused its discretion when it prohibited him from introducing evidence on the lenders' culpability or whether they received something of value in the fraudulent transactions; (3) committed plain error when it failed to instruct the jury on the characteristics of an enterprise or give a specific instruction on jury-verdict unanimity; and (4) abused its discretion when it assigned a severity level X to his racketeering conviction and by sentencing him at the top end of the

presumptive range. Maxwell challenges the sufficiency of the evidence to convict him of racketeering, and he presents eight additional claims in a pro se supplemental brief.

D E C I S I O N

I

In a criminal prosecution, evidence of other crimes or misconduct is not admissible to show bad character. Minn. R. Evid. 404(b); *See State v. Spreigl*, 272 Minn. 488, 490-91, 139 N.W.2d 167, 169 (1965) (stating general rule that other-crimes evidence is inadmissible and identifying exceptions). This evidence, referred to as *Spreigl* evidence, may, however, be admissible to show motive, intent, identity, absence of mistake, or common plan or scheme. *State v. Gomez*, 721 N.W.2d 871, 877 (Minn. 2006). The admission of *Spreigl* evidence is subject to the district court's discretion, and a ruling admitting or rejecting the evidence will be sustained absent a clear abuse of discretion. *State v. Steinbuch*, 514 N.W.2d 793, 800 (Minn. 1994). The district court admitted the evidence of Maxwell's prior conviction under the common plan or scheme exception.

A five-step process governs the admissibility of *Spreigl* evidence: (1) "the state must give notice of its intent to admit the evidence"; (2) the state must clearly indicate the purpose for which the evidence is offered; (3) the defendant's participation in the prior offense must be clear and convincing; (4) "the evidence must be relevant and material to the state's case"; and (5) the probative value of the evidence must not be outweighed by its potential for unfair prejudice. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). Under the common plan or scheme exception, other-crimes evidence does not have to be

identical, but must have a "marked similarity in modus operandi to the charged offense" that tends to corroborate evidence of the charged offense. *Id.* at 688. In an appeal from the admission of *Spreigl* evidence, the defendant bears the burden of showing error and any resulting prejudice. *Id.* at 685.

The district court ruled that all requirements for admission were met and that Maxwell's prior conviction involving real estate was admissible to show a common plan or scheme. Maxwell does not dispute that the state complied with the first four *Ness* requirements, but argues that admission of the evidence was an abuse of discretion because the prior conviction has no marked similarity to the charged offenses and its prejudice outweighed its probative value.

The evidence supports the district court's determination that there was a marked similarity in modus operandi between Maxwell's prior conviction and the charges in this case. Maxwell's prior conviction related to a fictitious pay stub purportedly documenting a Federal Housing Administration home-mortgage-insurance applicant's bi-weekly wage amount. In this prosecution, Maxwell was charged with providing lenders materially false information, which included pay stubs. In addition, the time between the prior offense and the current offenses is only four to five years and both offenses occurred in Minneapolis. Thus, there is a marked similarity between the offenses based on modus operandi, time, and place. *See State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998) (stating similarity is to be determined by modus operandi, time, and place).

The evidence also supports the district court's determination that the probative value of admitting the prior conviction outweighed any unfair prejudice. The concern for

unfair prejudice does not prevent the admission of all adverse or damaging evidence; it prevents only the admission of "evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

The district court considered the necessity of the *Spreigl* evidence as part of balancing the probative value against the prejudicial effect and noted that the state's case was based primarily on circumstantial evidence. *See Ness*, 707 N.W.2d at 690 (defining "need" in *Spreigl* context and directing that need is a component of the probative value-prejudicial effect balancing). Before the evidence was admitted at trial and again before closing arguments, the district court cautioned the jury against convicting Maxwell on the basis of the prior offense and explained the purpose for the other-crimes evidence. *See State v. Berry*, 484 N.W.2d 14, 18 (Minn. 1992) (stating that cautionary instructions reduced any unfair prejudicial effect of *Spreigl* evidence). We presume that the jury followed the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). And, although the evidence posed the risk of unfair prejudice, that risk was outweighed by its probative value in proving a common plan or scheme. *See* Minn. R. Evid. 404(b) (identifying permissible purposes for admitting evidence of another crime). On this record, the district court did not abuse its discretion when it admitted Maxwell's prior conviction.

II

We next address Maxwell's challenges to the district court's other evidentiary rulings. Evidentiary rulings on relevancy are generally left to the sound discretion of the

district court and will be sustained on appeal unless the ruling is an abuse of discretion. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005). "Relevant evidence" is evidence that tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. Minn. R. Evid. 401.

In a motion in limine, the state moved to suppress any evidence suggesting that the lender victims received something of value in the fraudulent transactions with Maxwell that were part of the theft-by-swindle charges. The state also moved to suppress evidence suggesting that the swindled lenders were greedy, negligent, imprudent, or incompetent in extending the loans. The district court granted both motions on grounds that the evidence was irrelevant. Maxwell argues that the evidence was relevant to his theft-by-swindle charges and therefore the court's ruling was an abuse of discretion.

In suppressing evidence related to value received by the lenders to diminish the theft-by-swindle charges, the district court relied on *State v. Lone*, 361 N.W.2d 854, 860 (Minn. 1985) for the proposition that "[i]n theft by swindle, value becomes irrelevant." Maxwell argues that the lenders received something of value in the mortgages on each property that should reduce the swindle charges to a value under the $35,000 amount that was an element of the charge. *Lone* establishes that the elements of a swindle can still be satisfied even if the people who are swindled received something of value. 361 N.W.2d at 860. And Maxwell's argument and defense to a theft-by-swindle charge—that the jury should have performed a balancing test by comparing the value of what the victims gave up in relation to what they received—was specifically rejected in *State v. Ulvestad*, 414 N.W.2d 737, 739-41 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). Thus, the

district court did not abuse its discretion by granting the state's motion to exclude evidence of value received by the swindled person.

In suppressing evidence that the lenders were greedy, negligent, imprudent, or incompetent in extending the loans, the district court relied on *State v. Hanson*, 285 N.W.2d 483, 486 (Minn. 1979), for the proposition that theft by swindle "punishes any fraudulent scheme, trick, or device whereby the wrongdoer deprives the victim of his money or property by deceit or betrayal of confidence" and that "[n]o additional instruction on the victim's prudence is required, and none should be given." The district court concluded that evidence placing blame on the lender was irrelevant to a theft-by-swindle charge because Maxwell's alleged culpability was not reduced by evidence showing that he swindled gullible or greedy lenders rather than prudent lenders. The court's conclusion is supported by *Hanson* and we conclude that it was not an abuse of discretion to grant the state's motion to suppress evidence attempting to place blame on the lenders.

III

The jury-instruction issues present a more complex question. Maxwell contends that the district court committed plain error when it failed to provide a specific jury instruction on the characteristics of an enterprise and on jury-verdict unanimity. "District courts are allowed considerable latitude in the selection of language for jury instructions." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). When reviewed for error, the instructions must be viewed "in their entirety to determine whether they fairly and adequately explain the law." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

"Due process requires that every element of the offense charged must be [proved] beyond a reasonable doubt by the prosecution." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). A jury verdict must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5).

At trial Maxwell did not request, or object to the lack of, a specific instruction on the characteristics of an enterprise or jury-verdict unanimity. The failure to object to jury instructions at trial ordinarily results in forfeiture of the right to object on appeal. *State v. Yang*, 774 N.W.2d 539, 557 (Minn. 2009). But "[w]e may review an unobjected-to instruction if there is (1) an error; (2) that is plain; and (3) affects substantial rights." *Id.* If these three requirements are satisfied, we will correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Maxwell was charged with racketeering under Minnesota Statutes section 609.903, subdivisions 1(1) and (3), which provide that whoever "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" or "participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise or in real property" is guilty of racketeering. Maxwell argues that the district court erred when it instructed the jury only on the statutory definition of "enterprise" and failed to provide, on its own initiative, additional instructions on the characteristics of an "enterprise" as encouraged by the supreme court in *State v. Huynh*, 519 N.W.2d 191, 196-97 (Minn. 1994).

The statute defines enterprise as "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 (2006). The supreme court determined that, for purposes of the racketeering statute, an "enterprise" is characterized by (1) a common purpose among its members, (2) an ongoing and continuing structure, and (3) activities that extend beyond the commission of the underlying criminal offenses. *Huynh*, 519 N.W.2d at 196. Based on that determination, the supreme court directed that in addition to the pertinent statutory provisions, "generally, henceforth, the jury should also be instructed on the characterizations of an enterprise." *Id.* at 197. Thus, the district court erred when it failed to instruct the jury on the characteristics of an enterprise, and in light of the directive in *Huynh*, this error was plain. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating error is plain if it contravenes caselaw).

In *Huynh*, the state alleged the existence of an association-in-fact, rather than a legal entity. 519 N.W.2d at 197. Here, the state's proof of an "enterprise" centered on two legal entities—Realty Executives and Worldlink Mortgage. There was abundant evidence that Maxwell acted as an employee of Realty Executives and a loan officer at Worldlink Mortgage. Realty Executives received commissions from the real-estate transactions that were alleged to be fraudulent, and Worldlink Mortgage received fees. The prosecutor did not argue that the offenses were committed as part of a more informal "enterprise," an association-in-fact that was not a legal entity. Therefore, the district court's failure to give the *Huynh* instruction further defining such informal "enterprises"

did not significantly affect the jury's verdict. Thus, Maxwell has not shown prejudice under the third plain-error prong.

Maxwell also claims that the district court's failure to provide a specific instruction on jury-verdict unanimity was plain error. District courts must avoid jury instructions that "are unclear and potentially raise doubt about the unanimity of the jury verdict." *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). If "jury instructions allow for possible significant disagreement among jurors [on which] acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *Id.* at 354 (citing *State v. Begbie*, 415 N.W.2d 103, 105 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988)). "But 'unanimity is not required with respect to the alternative means or ways in which the crime can be committed.'" *Id*. at 354-55 (quoting *Begbie*, 415 N.W.2d at 106).

Maxwell argues that the state, by charging him with racketeering under section 609.903, subdivisions 1(1) and (3), alleged two different acts that could support his conviction for racketeering. We agree that it would have been better to charge violations of subdivision 1(1) and subdivision 1(3) in separate counts. But, without deciding whether it was error not to give a specific jury-unanimity instruction, we conclude that Maxwell has not shown prejudice under the third plain-error prong.

The state's theory, amply supported by the evidence, was that Maxwell, an employee of Realty Executives and Worldlink Mortgage, participated in a "pattern of criminal activity" along with those two legal entities. The state alleged that Maxwell was the "deal-maker," the linchpin of the criminal activity, thereby violating subdivision 1(1).

The state did not claim that Maxwell engaged in a "pattern of criminal activity" that constituted racketeering merely because the proceeds of that activity were invested "in an enterprise or in real property." Minn. Stat. § 609.903, subd. 1(3) (2006). The prosecutor briefly argued that the proceeds of the fraudulent transactions were reinvested in real property, but that was through Realty Executives, which was part of the criminal "enterprise." Therefore, the jury had no basis to distinguish between an investment of proceeds in the "enterprise" and an investment of proceeds in real property. Thus, we conclude that there is no reasonable likelihood that any error in failing to give a jury-unanimity instruction had a significant effect on the jury's verdict. *See generally Ihle*, 640 N.W.2d at 917. And therefore the district court's error, if any, did not affect Maxwell's substantial rights.

IV

Maxwell argues that, as a matter of law, the evidence at trial was insufficient to support his conviction for racketeering. When reviewing a sufficiency-of-the-evidence claim, our review is "limited to a painstaking analysis of the record to determine whether the evidence," viewed in the light most favorable to the verdict, supports the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In this analysis, we assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will sustain the jury's 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 a defendant" was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Maxwell argues that the state failed to prove that he was associated with, or employed by, an enterprise as required by section 609.903, subdivision 1(1), because the evidence was insufficient to establish a continuity of organizational structure and personnel. *See Huynh*, 519 N.W.2d at 197 (requiring finding of continuity in structure and personnel to establish existence of enterprise). The evidence, however, shows otherwise.

A participant in the mortgage-fraud scheme testified that he created fake identification documents and provided them to Maxwell who, through his positions at Realty Executives and Worldlink Mortgage, obtained financing for the fraudulent purchase of four properties under the fake identity from 2005 to 2007. This evidence establishes that the mortgage-fraud scheme extended over a period of at least one and up to two years until it was exposed. Maxwell met with this participant throughout 2005 and in 2006 to talk about purchasing real estate with the fake identity. Maxwell paid the participant for his role in purchasing each property. This evidence, together with the inferences the jury could draw from it, establishes a regular, business-like organizational structure and continuity of personnel that is sufficient beyond a reasonable doubt to sustain Maxwell's racketeering conviction. *See id.* (holding that continuity of structure and personnel exists when evidence establishes regular, business-like organization).

In addition, evidence in the record is sufficient to convict Maxwell of racketeering under section 609.903, subdivision 1(3). A person is guilty of racketeering if he "participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds,

in an enterprise or in real property." Minn. Stat. § 609.903, subd. 1(3). "'Real property' means any real property or an interest in real property, including a lease of, or mortgage on, real property." Minn. Stat. § 609.902, subd. 10 (2006).

The evidence overwhelmingly establishes that Maxwell fraudulently obtained loans from banks to purchase real estate. Witnesses testified that Maxwell used the fraudulently obtained loan proceeds to pay off fake third mortgages held in his assistant's name and his wife's company's name. Significantly, Maxwell does not dispute that proceeds from his pattern of criminal activity were invested in real property. This evidence was sufficient to convict Maxwell of racketeering under section 609.903, subdivision 1(3).

V

Racketeering is an unranked offense. Minn. Sent. Guidelines cmt. II.A.03 (2006). In imposing sentence, the district court assigned Maxwell's racketeering offense a severity level X. Maxwell contends that the severity-level determination is an abuse of discretion. When an offense is unranked, "judges should exercise their discretion by assigning . . . a severity level which they believe to be appropriate." Minn. Sent. Guidelines cmt. II.A.05 (2006). In selecting a severity level, judges should consider (1) "the gravity of the specific conduct underlying the unranked offense," (2) the severity level for similarly ranked offenses, and (3) the conduct of similarly situated offenders. *State v. Kenard*, 606 N.W.2d 440, 443 (Minn. 2000). No single factor is controlling and the list of factors is not meant to be exhaustive. *Id.* While the district court has discretion in sentencing, these factors can help guide the exercise of that discretion. *Id.*

The record provides a written account of the district court's careful application of the *Kenard* factors in ranking Maxwell's racketeering offense at severity level X. Considering the first factor, the gravity of Maxwell's conduct, the court found that he "manifested a high level of sophistication . . . using his control over a real estate agency and mortgage broker." It noted that Maxwell manufactured fake documents; stole the identity of an innocent person, which caused that person's family to suffer "financial devastation"; and "caused significant economic and societal harm." The district court determined that the first factor compelled a high severity ranking.

To evaluate the reasonableness or unreasonableness of a high severity ranking, the district court considered the severity level that has been assigned to other racketeering offenses. The district court's inquiry showed that Minnesota courts had imposed a sentence for racketeering forty-five times. Of those forty-five cases, eighteen were ranked at level VIII or IX and two were ranked at level X. The court found these statistics to provide limited guidance in determining the severity level of Maxwell's racketeering offense because the other cases involved a wide range of conduct.

The district court's inquiry on past rankings also took into account the *Kenard* factor that considers the severity level assigned to other offenders engaged in similar conduct. On this factor, the district court stated that it was "unaware of any published Minnesota state cases involving conduct similar to that engaged in by [Maxwell]." Because it knew of no similar cases, the district court relied on the predicate crimes underlying Maxwell's racketeering conviction to provide guidance. It considered that a pattern of predicate crimes was more serious than a single predicate crime and concluded

that because Maxwell's identity theft conviction carried a severity level VIII ranking and his other convictions were ranked at levels II and VI, his racketeering conviction based on those convictions should be ranked beyond level IX. Because the district court reasonably considered and applied the *Kenard* factors, we conclude that it did not abuse its discretion when ranking Maxwell's racketeering conviction at level X.

Maxwell also argues that the district court abused its discretion when it sentenced him at the top end of the presumptive range. Sentences imposed by the district court are reviewed for abuse of discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). Generally, we will not review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range. *State v. Starnes*, 396 N.W.2d 676, 681 (Minn. App. 1986). "Presumptive sentences are seldom overturned." *State v. Andren*, 347 N.W.2d 846, 848 (Minn. App. 1984). Only in a "rare" case will a reviewing court reverse imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The district court's sentence within the presumptive range will not be modified "absent compelling circumstances." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982).

Maxwell has not provided evidence of a compelling circumstance to support his argument that the district court abused its discretion by sentencing him at the top of the presumptive range. We conclude that we have no reasonable basis on which to modify Maxwell's sentence.

VI

In a pro se supplemental brief, Maxwell presents eight additional claims for review. These claims, however, are not supported by legal authority or, for the most part, by facts in the record. Consequently, the claims cannot provide a basis for reversal "unless prejudicial error is obvious on mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 520, 187 N.W.2d 133, 135 (1971). We review these claims for obvious prejudicial error.

Maxwell's eight additional claims can be reduced to three: he claims that (1) the district court was biased and prejudiced in its performance of its duties, (2) the district court abused its discretion when it excluded evidence of the lenders' culpability; and (3) the evidence was insufficient to convict him of identity theft.

It is not obvious from mere inspection that the district court performed its duties with bias or prejudice. We have already addressed the district court's exclusion of evidence relating to the lenders' culpability. And, viewed in the light most favorable to the verdict and under the assumption that the jury believed the state's witnesses, the evidence was sufficient to convict Maxwell of identity theft. Thus, the claims presented in Maxwell's supplemental brief do not provide a basis for reversal.

Affirmed.