STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2323

State of Minnesota,
Respondent,

vs.

Marlon Terrell Pratt,
Appellant.

Filed June 6, 2011
Affirmed in part, reversed in part, and remanded
Larkin, Judge
Concurring specially, Minge, Judge
Dissenting, Klaphake, Judge

Hennepin County District Court
File No. 27-CR-08-44935

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

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

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

LARKIN, Judge

Following his conviction of two counts of racketeering and seventeen counts of theft by swindle, appellant challenges the presiding judge's failure to disqualify himself, the sufficiency of the evidence to support his theft-by-swindle convictions, the jury instructions, the jury verdicts, and the district court's sentencing determinations. Appellant presents four additional claims of error in a pro se supplemental brief. Because we conclude that disqualification was not required, the evidence was sufficient to support appellant's theft-by-swindle convictions, any error in the jury instructions was harmless beyond a reasonable doubt and did not affect appellant's substantial rights, the jury verdicts were not legally inconsistent, the district court did not abuse its discretion by imposing an upward durational departure on appellant's racketeering convictions, and the claims presented in appellant's pro se supplemental brief do not provide a basis for reversal, we affirm in part. But because the district court improperly sentenced appellant on both racketeering offenses, which resulted in improper sentences on his theft-by-swindle offenses, we reverse the sentences and remand for resentencing.

FACTS

A jury found appellant Marlon Terrell Pratt guilty of two counts of racketeering and seventeen counts of theft by swindle over $35,000 based on his involvement in a mortgage-fraud scheme. Pratt procured more than $3,000,000 from lenders by submitting, through his employment at two mortgage brokerage firms, Universal Mortgage Inc. and Superior Mortgage Inc., loan applications containing materially false

information regarding purchase prices and the borrowers' assets, liabilities, and intended use of the property.

In each transaction, the loan application stated an inflated purchase price, which enabled Pratt to receive a kickback from the loan proceeds. The kickbacks were concealed from the lenders by the inflated purchase prices and by separate checks issued at closing to either the seller or to Pratt Construction for nonexistent property improvements. In some cases, Pratt advanced funds to borrowers for down payments without disclosing the arrangement to lenders and was eventually repaid out of the kickback from the loan proceeds.

At trial, two participants in the mortgage-fraud scheme testified that they worked at Universal Mortgage and Superior Mortgage and that they were involved in the kickback scheme with Pratt, as well as in other legitimate transactions. The mortgage brokerage firms were incorporated companies that operated similar to a business with training, pay structures, and a hierarchy of authority. The participants served as purchasers in multiple transactions and received checks from the sellers issued to Pratt or Pratt Construction. Pratt then endorsed the checks and distributed a portion of the proceeds to the participants. In other transactions, sellers issued checks to the participants, and they endorsed the checks and distributed a portion of the proceeds to Pratt. The participants and Pratt also received kickbacks from other fraudulent transactions. And the participants, with Pratt's assistance, also submitted loan applications containing false statements to lenders.

After the jury returned its verdict, Pratt moved to remove the judge assigned to his case based on an alleged conflict of interest resulting from the judge's service as a consultant for the civil division of the Hennepin County Attorney's Office (HCAO),[1] which was also the prosecuting authority in Pratt's criminal case. The assigned judge denied Pratt's motion. Next, the motion was scheduled before the chief judge of the fourth judicial district who also denied the motion. Pratt then filed a petition for a writ of prohibition in this court to prevent the assigned judge from presiding over further proceedings in his case. This court denied Pratt's motion in an order issued on September 23, 2009, because we found that Pratt failed to show that the assigned judge's impartiality could be reasonably questioned. *State v. Pratt*, No. A09-1685 (Minn. App. Sept. 23, 2009) (order). The supreme court granted Pratt's petition for review and, based on the state's motion, later vacated the grant of review. *State v. Pratt*, A09-1685 (Minn. App. Sept. 23, 2009) (order), *review granted* (Minn. Nov. 17, 2009) *and order granting review vacated* (Minn. Feb. 4, 2010).

After the grant of review was vacated, the district court submitted the case to a *Blakely* jury to determine if aggravating factors existed to support an upward durational departure for either the theft-by-swindle offenses or the racketeering offenses. The jury determined that Pratt used his position of trust or confidence to commit the theft-by-swindle offenses, but that the actual monetary loss to the lenders was less than $250. The jury found two aggravating factors related to the racketeering offenses: Pratt used a high

[1] The assigned judge was a retired judge who had been specially assigned to preside over Pratt's trial.

degree of sophistication and used his position of trust or confidence to commit the offenses.

At sentencing, the district court ranked the racketeering offenses at severity level IX. The district court sentenced Pratt to 120 months imprisonment for each racketeering offense, an upward durational departure, to 39 months imprisonment for each theft-by-swindle offense, and ordered all sentences to run concurrently. This appeal follows.

D E C I S I O N

Pratt argues that (1) he was denied a fair trial as a result of the presiding trial judge's appearance of impropriety; (2) the evidence was insufficient to sustain his theft-by-swindle convictions; (3) the district court abused its discretion when instructing the jury on theft by swindle; (4) the district court committed plain error when it failed to give a specific jury instruction on the characteristics of an enterprise; (5) the jury returned legally inconsistent jury verdicts; (6) he was improperly convicted and sentenced for both racketeering offenses; (7) he was improperly sentenced on the theft-by-swindle offenses; and (8) the district court abused its discretion by imposing an upward durational departure from the presumptive sentence for racketeering. Pratt raises four additional arguments in a pro se supplemental brief. We address each argument in turn.

I.

Pratt claims that he was denied a fair trial because the presiding judge had a conflict of interest that created an appearance of impropriety in violation of the Code of Judicial Conduct. This court previously considered and ruled on this issue in a special-term order. *State v. Pratt*, No. A09-1685 (Minn. App. Sept. 23, 2009) (order). We would

not normally reconsider the issue. *See* Minn. R. Civ. App. P. 140.01 ("No petition for rehearing shall be allowed in the Court of Appeals."). But Pratt petitioned the Minnesota Supreme Court for further review of the issue, and although the supreme court ultimately dismissed Pratt's petition, it expressly preserved the issue for direct appeal. *State v. Pratt*, A09-1685 (Minn. App. Sept. 23, 2009) (order), *review granted* (Minn. Nov. 17, 2009) *and order granting review vacated* (Minn. Feb. 4, 2010). Under these unique circumstances, we address the issue on its merits.

"Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo." *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005). "A motion to remove a judge for cause is procedural and is therefore governed by the rules of criminal procedure." *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004). Under the rules, "[n]o judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 13(3).[2] However, a notice to remove is not "effective against a judge who has already presided at the trial, Omnibus Hearing, or other evidentiary hearing" except upon a showing of cause. *Id.*, subd. 13(4).

"A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Minn. Code Jud. Conduct, Canon 3D(1).[3] "'Impartiality' or 'impartial' denotes absence of bias or prejudice in favor of, or

[2] Contrary to Pratt's assertion, rule 26.03 does not entitle a movant to an evidentiary hearing on a motion to remove.

[3] On July 1, 2009, the Code of Judicial Conduct was amended. The amendments apply to all conduct occurring on or after that date. The pre-amendment version of the Code was

against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." *Id.*, Canon 3F. "The grounds for disqualification in Canon 3D(1) are stated broadly, leaving considerable room for interpretation in their application to any given set of circumstances. Canon 3D(1) does not provide a precise formula that can automatically be applied." *Greer v. State*, 673 N.W.2d 151, 156 (Minn. 2004) (citation and quotation omitted).

In determining whether a judge should be disqualified under Canon 3D(1), the question is whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge's impartiality. *Dorsey*, 701 N.W.2d at 248; *Powell v Anderson*, 660 N.W.2d 107, 116 (Minn. 2003). "The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008). "Likewise, the fact that a judge avows he is impartial does not in itself put his impartiality beyond reasonable question." *Id.* at 602.

> Judges, of course, should be sensitive to the "appearance of impropriety" and should take measures to assure that litigants have no cause to think their case is not being fairly judged. Nevertheless, a judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation.

Id. (quotation omitted)

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in effect during the majority of Pratt's trial from June 3, 2009 to July 9, 2009. The language in Canon 3D(1) now appears in Rule 2.11(A).

Pratt argues that the assigned judge's relationship with the HCAO as a consultant in an unrelated civil matter presented an appearance of impropriety in his criminal trial, which was prosecuted by the HCAO, and required the judge's disqualification. The record indicates that the HCAO met with the judge, who was retired, in late December 2008 to see whether he would be interested in providing expert testimony in a civil case on behalf of its client, the Hennepin County Medical Center. The judge agreed to provide expert testimony if the case proceeded to trial. This was the only meeting between the judge and the HCAO regarding the proposal, and the judge did not receive any compensation from the HCAO. The judge did not hear from the HCAO regarding the civil case until approximately six months later. In the meantime, the judge accepted Pratt's criminal-case assignment as a retired judge. Just before jury deliberations in Pratt's trial, an attorney from the HCAO contacted the judge to inform him that the civil case was proceeding to trial and that his expert testimony was requested. The judge declined the offer, explaining that he was no longer available. On July 2, 2009, the state disclosed this relationship on the record at Pratt's criminal trial. On July 7, jury deliberations began and the judge, on the record, returned to the HCAO an unopened package of documents relating to the civil case and described his relationship with the HCAO as a "proposed engagement."

On July 8, an hour before the jury concluded deliberations in Pratt's trial, Pratt filed, by e-mail, a motion to dismiss with prejudice based on the judge's alleged conflict of interest. Pratt filed a motion to remove the judge on July 9. Pratt asserted that the alleged conflict of interest created a reasonable question as to the judge's impartiality that

obligated the judge to disqualify himself. The assigned judge, however, asserted that he was impartial. We must determine whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge's impartiality. *Powell* provides the appropriate framework for our analysis.

In *Powell*, the supreme court applied the "'objective examination' standard of review for the purpose of determining the initial issue of disqualification" where an appellate judge had a relationship with a law firm representing a party appearing before the judge. *Powell*, 660 N.W.2d at 116. The supreme court concluded that "a reviewing court, pursuing an objective examination of a case where a judge has had an attorney-client relationship with an attorney appearing before the judge, should generally weigh four factors in deciding on disqualification." *Id*. at 118. Those four factors include: (1) "the extent of the attorney-client relationship;" (2) "the nature of the representation;" (3) "the frequency, volume and quality of contacts between the judge and the attorney or law firm;" and (4) "any special circumstances that might either enhance or limit" the importance of the relationship to the judge or "the appearance of impropriety to the public." *Id.* Although *Powell* involved a relationship between an appellate judge and a law firm appearing before the judge, which represented a trust of which the appellate judge was the trustee, the same test is useful in analyzing the relationship at issue here: a consulting relationship between a district court judge and a law firm appearing before the judge.

The *Powell* factors do not favor disqualification. The first factor does not favor disqualification because the relationship between the judge and the HCAO entailed only

one meeting. *See id.* (providing that relationships constituting "a single, short episode, or even a series of sporadic contacts" will not favor disqualification). The second factor also does not favor disqualification because the relationship involved the judge in an institutional or technical role as an expert witness; it did not involve the judge on a personal level. *See id.* (providing that personal relationships are "more indicative of a reasonable question" of impartiality "than a relationship that only involves the judge in some institutional or technical role"). The third factor does not favor disqualification because the contacts between the judge and HCAO were infrequent and minimal and involved no aspect of Pratt's trial. *See id.* (stating that "[t]he more frequent and substantial these contacts, the more likely the relationship is to create a reasonable question as to impartiality" and "the closer the contacts come to the subject of the case before the judge, the greater the impact on impartiality"). The fourth factor also does not favor disqualification. The facts suggest that the judge's consulting relationship with the HCAO was not important to him. He was never paid for his services and ultimately did not provide any testimony. Moreover, it is not clear that the HCAO would have offered the judge additional consulting opportunities based on his services as an expert witness in the civil case. And no special circumstances have been identified that might enhance the appearance of impropriety to the public. In sum, under *Powell*, disqualification was not required in this case.[4]

[4] We recognize that the public may perceive an appearance of impropriety when a judge presides over a trial that is being prosecuted by the same agency with whom the judge has a current consulting relationship, no matter how small or insignificant the relationship is to the judge. Under these circumstances, it is preferable for the judge to disclose the

But even if disqualification were required, we are not convinced that the failure to disqualify would require reversal. "[N]ot every case involving judicial disqualification deserves vacatur." *Powell*, 660 N.W.2d at 120. "A conclusion that a statutory violation occurred does not, however, end [the] inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Id.* at 120 (quotation omitted). The *Powell* court adopted a three-factor balancing test applied by the United States Supreme Court in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194 (1988). *Id.* at 120-24. The Supreme Court's approach considers (1) "the risk of injustice to the parties in the particular case," (2) "the risk that the denial of relief will produce injustice in other cases," and (3) "the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864, 108 S. Ct. at 2205.

The first two factors would not require reversal. Pratt does not explain how the judge's alleged conflict of interest affected his trial or assert that he suffered any prejudice attributable to the conflict. *See Powell*, 660 N.W.2d at 121-23 (finding errors in appellate decision-making to constitute risk of injustice). Thus, there is no injustice to Pratt. And an affirmance in an unpublished opinion will not produce injustice in other cases. *See id.* at 123 (finding unpublished opinion reduces risk of injustice in other cases). Although there may be a risk that the public's confidence in the judicial process will be somewhat undermined where a judge presides over a trial that is being prosecuted

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relationship to the parties and counsel. *See Desnick v. Mast*, 311 Minn. 356, 362-63, 249 N.W.2d 878, 882-83 (1976) (stating preference for disclosure).

by the same agency with whom the judge has a current consulting relationship, the facts and circumstances in this case do not expose trial prejudice or even a trace of bias on the judge's part. Indeed, Pratt does not allege any actual bias or prejudice.[5] The risk of undermining the public's confidence therefore is minimal. In sum, even if the judge's refusal to recuse himself was error, the error would not provide a basis for reversal.

II.

Pratt claims that the evidence at trial was insufficient to sustain his convictions of theft by swindle. 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 so doing, 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 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

[5] Because Pratt fails to allege or establish actual bias or prejudice, a high probability of any actual bias, or that the judge had a direct pecuniary interest in the outcome of his trial, his argument that the judge's service gave rise to a structural defect and due-process violation requiring reversal is unpersuasive. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259-60 (2009) (requiring high probability of actual bias or direct pecuniary interest in order to find automatic disqualifying due-process violation); *Dorsey*, 701 N.W.2d at 252-53 (requiring evidence of actual bias or prejudice before concluding that structural error exists).

Pratt admits that the evidence at trial was sufficient to establish that he was the loan officer responsible for submitting false loan applications to lenders and that the lenders extended the loans. But he argues that because there was no testimony from any of the lenders, the evidence was insufficient to show that the swindle (i.e., the false loan applications) was the reason that the lenders extended the loans. We disagree.

An expert in the mortgage lending industry testified that information in loan applications is used by lenders to determine creditworthiness. The expert testified that lenders work closely with mortgage brokers and rely on some basic information when making a decision to loan money. That information includes the borrower's employment history, intended use of the property, source of funds for down payment, assets, income, and liabilities described in the loan application. The expert also testified about the warranties and promises made to lenders by mortgage brokers that all the information provided to the lenders is true and accurate and that the loan application's purpose is to obtain a loan. The expert was not aware of any lenders that had approved a loan in which a substantial amount of the money was going back to the borrower as cash.

Based on this evidence, viewed in a light most favorable to the jury's verdict and assuming the jury believed no contrary evidence, the jury could reasonably conclude that the lenders relied on the false statements in the loan applications in extending loans for the purchase of the properties underlying Pratt's 17 theft-by-swindle convictions. Thus, the evidence was sufficient to support Pratt's theft-by-swindle convictions.

III.

Pratt claims that the district court abused its discretion when instructing the jury on the elements of theft by swindle. "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, jury 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). An error in jury instructions "may not require a new trial . . . if the error was harmless." *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997). "An error in jury instructions is not harmless and a new trial should be granted if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id*.

The district court properly instructed the jury that a person is guilty of theft by swindle if that person "obtains property or services from another person by swindling, whether by artifice, trick, or device." *See* Minn. Stat. § 609.52, subd. 2(4) (2006). But when it explained the elements of theft by swindle, the district court instructed the jury that it had to find that "the lender gave up loan funds to the defendant or another because of the swindle." Pratt argues that replacing "property or services" with "loan funds" was an abuse of discretion and prejudicial error because it relieved the state from the burden of proving every element of the crime.

Pratt's argument is unpersuasive because even if the instruction was error, it was harmless beyond a reasonable doubt. The loan funds were the only possible "property or service" that the lenders could have been swindled out of. Pratt's own counsel argued in

closing that "when it comes to theft by swindle . . . when you're talking about a swindle, it means you're beating somebody out of [their] money. In other words, you trick'em, take the money, . . . take the money, you run and you go." In his next sentence, counsel referred to the "loans" four times in arguing that the lenders were not swindled out of their money. Any error in replacing "property or service" with "loan funds" in the jury instructions had no significant impact on the verdict and was harmless beyond a reasonable doubt.

IV.

Pratt claims that the district court committed plain error when it failed to provide a specific jury instruction on the characteristics of an enterprise. "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).

At trial Pratt did not request, or object to the lack of, a specific instruction on the characteristics of an enterprise. The failure to object to jury instructions at trial ordinarily results in the appellant forfeiting his 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 only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Pratt was charged with two counts of racketeering under Minn. Stat. § 609.903, subd. 1(1), (3) (2006). Subdivision 1(1) provides 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" is guilty of racketeering. Subdivision 1(3) provides that whoever "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. Pratt argues that the district court erred when it only instructed the jury on the statutory definition of "enterprise" and failed to provide, on its own initiative, instructions on the characteristics of an "enterprise" as required by *State v. Huynh*, 519 N.W.2d 191, 196 (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). In 1994, the supreme court ruled 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. The supreme court directed that in addition to the pertinent statutory provisions, "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, which error was plain in light of the supreme court's directive in *Huynh*. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating error is plain if it contravenes caselaw).

In the specific circumstances of Pratt's trial, however, correction of the district court's error is not necessary because the error did not affect Pratt's substantial rights or affect the fairness of his trial. The following testimonial evidence overwhelmingly establishes the existence of an enterprise with the characteristics described in *Huynh*: (1) Pratt worked at Universal Mortgage and Superior Mortgage, both mortgage brokerage firms, as a loan officer with two colleagues who were participants not only in the kickback scheme, but who were also involved in other legitimate transactions; (2) the mortgage brokerage firms were incorporated companies that operated like a business with training, pay structures, and a hierarchy of authority; (3) in multiple property purchases, Pratt's colleagues, as the purchasers, received checks from the seller issued to Pratt or Pratt Construction; (4) Pratt would then endorse the checks and distribute some of the proceeds to his colleagues; (5) in transactions in which sellers issued checks to the colleagues, the colleagues would endorse the checks and distribute a portion of the proceeds to Pratt; (6) Pratt and his colleagues received kickbacks from other fraudulent transactions not involving the other; and (7) the colleagues, with Pratt's assistance, submitted loan applications containing false statements to lenders.

This evidence, together with the inferences the jury could draw from it, establishes that Pratt was associated with two mortgage brokerage firms, entities that fit the statutory definition of an enterprise, and colleagues working at the firms who shared the common purpose to obtain financing based on fraudulent loan applications and receive funds from the loan proceeds. This same evidence shows that there was a regular, business-like organizational structure and continuity of personnel that was engaged in activities

extending beyond the commission of the underlying thefts by swindle. *See Huynh*, 519 N.W.2d at 197 (holding that continuity of structure and personnel exists where evidence establishes regular, business-like organization). Because the evidence in this case overwhelmingly establishes the existence of an enterprise as described in *Huynh*, the district court's failure to instruct the jury on the characteristics of an enterprise did not affect the outcome of the case and, therefore, did not affect Pratt's substantial rights. *See Ihle*, 640 N.W.2d at 917 (stating error affects substantial rights if prejudicial and affects outcome of case).

V.

Generally, a legally inconsistent jury verdict warrants reversal. *Crowsbreast*, 629 N.W.2d at 440. Pratt argues that the jury's finding of guilt on the 17 counts of theft by swindle over $35,000 is legally inconsistent with its special verdict finding that the "actual monetary loss" was zero. These findings are not inconsistent. In determining guilt, the jury was asked to determine if the value of the loans was over $35,000. In its special verdicts, the jury was asked to determine the net monetary loss suffered by the lenders in the fraudulent transactions. These figures entail different valuation methods and are not legally inconsistent.

VI.

Pratt claims that he was improperly convicted on both counts of racketeering in violation of Minn. Stat. § 609.04 (2006). Section 609.04 states that a person "may be convicted of either the crime charged or an included offense, but not both." Although Pratt was convicted of two counts of racketeering, neither is an included offense of the

other, and the two counts required proof of different elements. *See* Minn. Stat. § 609.04, subd. 1 (defining included offense). *Compare* 10A *Minnesota Practice*, CRIMJIG 30.06 (2006) (listing elements of racketeering—association with enterprise), *with* 10A *Minnesota Practice*, CRIMJIG 30.10 (2006) (listing elements of racketeering—investment of proceeds). Thus, Pratt was properly convicted of both counts of racketeering.

Pratt also claims that he was improperly sentenced on each racketeering conviction in violation of Minn. Stat. § 609.035 (2006). Section 609.035 provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." On both counts of racketeering, the district court instructed the jury that it had to find that Pratt's criminal acts "took place from November, 2004 through December, 2007 in Hennepin County."

Because both of Pratt's racketeering convictions were based on his conduct occurring from November 2004 through December 2007, his conduct resulted in convictions for more than one offense and he should have been sentenced on only one of the convictions. We therefore reverse the sentence on one of the racketeering offenses, with the jury's guilty verdict left in force, and remand to the district court to correct the official judgment of conviction to reflect a formal sentence on only one racketeering conviction. *See State v. Barrientos-Quintana*, 787 N.W.2d 603, 614 (Minn. 2010) (vacating sentence, leaving verdict in force, and remanding to district court to correct sentence).

VII.

After imposing sentences for Pratt's two racketeering convictions, the district court imposed a sentence of 39 months for each theft-by-swindle conviction, with all sentences to be served concurrently. Although the district court did not explain how it determined the length of the theft-by-swindle sentences, it appears that the court used a criminal history score of four, which resulted from imposition of the two racketeering sentences. Pratt claims that the district court abused its discretion in using the *Hernandez* method to sentence him for the theft-by-swindle offenses based on a criminal history score of four. *See State v. Hernandez*, 311 N.W.2d 478, 479-81 (Minn. 1981) (in sentencing a convicted defendant on the same day for three convictions based on different offenses not part of the same behavioral incident or course of conduct and involving different victims, the district court could consider the first two convictions in determining the defendant's criminal history score for the third conviction). Pratt's argument is persuasive.

Although one racketeering sentence may be imposed in addition to separate sentences for the underlying predicate offenses of theft by swindle, Minn. Stat. § 609.910, subd. 1 (2006), the district court should not have increased Pratt's criminal history score with the racketeering convictions when sentencing Pratt for the theft-by-swindle convictions. *See State v. Huynh*, 504 N.W.2d 477, 484 (Minn. App. 1993) (holding that where multiple sentencing is permitted pursuant to Minn. Stat. § 609.910, as opposed to Minn. Stat. § 609.035, the *Hernandez* method cannot be used to increase a defendant's criminal history score) *aff'd*, 519 N.W.2d 191 (Minn. 1994). We therefore

reverse the sentences on the theft-by-swindle convictions and remand to the district court for resentencing on these convictions.

VIII.

Pratt claims that the district court abused its discretion when it sentenced him to 120 months in prison for his racketeering convictions, an upward durational departure of 17 months from the top end of the presumptive sentence range. *See* Minn. Sent. Guidelines IV (2006) (providing presumptive sentence range of 74 to 103 months for offenses with severity level IX and zero criminal history score).

A sentencing departure must be justified by substantial and compelling circumstances in the record. *State v. Losh*, 721 N.W.2d 886, 895 (Minn. 2006). When the record "supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a 'strong feeling' that the sentence is disproportional to the offense." *State v. Woelfel*, 621 N.W.2d 767, 774 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Mar. 27, 2001). The reasons used to justify a sentencing departure must not themselves be elements of the underlying crime. *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008).

The Minnesota Sentencing Guidelines state that the commission of a major economic offense may be considered an aggravating factor that justifies sentencing departure. Minn. Sent. Guidelines II.D.2.b.(4) (2006). The guidelines describe an offense that can qualify as a major economic offense as "an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business

or professional advantage" and occurring where two or more specified circumstances are present. *Id.* In this case, the jury found that for each racketeering conviction, two specified circumstances were present: (1) Pratt committed the offenses "using a high degree of sophistication or planning" or they occurred "over a lengthy period of time;" and (2) Pratt committed the offenses "using his position or status to facilitate the commission of the crime, including a position of trust, confidence, or a fiduciary relationship."

Pratt argues that the district court's upward durational departure was improper because (1) the jury did not find that the racketeering offenses met the definition of a major economic offense; (2) the jury's finding that he used his position or status to facilitate commission of the crime duplicates an element of the racketeering offense; and (3) the district court relied on only one of the specified circumstances when imposing the upward durational departure. We disagree.

First, the jury's guilty verdicts establish, beyond a reasonable doubt, that Pratt committed 17 thefts by swindle in which he fraudulently obtained money from banks through his association with two mortgage brokerage firms. *See Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004) (providing that sentence must be based on facts reflected in jury verdict). There is no question that these offenses constitute "an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property." *See* Minn. Sent. Guidelines II.D.2.b.(4) (defining major economic offense); *see also State v. O'Hagan*, 474 N.W.2d 613, 623-24 (Minn. App. 1991) (upward durational departure from presumptive

guidelines sentence appropriate where conduct constitutes major economic offense and aggravating factors exist), *review denied* (Minn. Sept. 25, 1991). Furthermore, the district court instructed the *Blakely* jury on the definition of a major economic offense. Thus, the jury found that his racketeering offenses, based on 17 theft-by-swindle offenses, met the initial definition of a major economic offense.

Second, the jury's finding that Pratt used "his position or status to facilitate the commission of the crime, including a position of trust, confidence, or a fiduciary relationship" to commit racketeering does not duplicate an element of racketeering. Pratt argues that this finding duplicates an element of his racketeering offense because racketeering requires participation in an enterprise. But the mere fact that a person holds a position or status in an enterprise is not tantamount to occupation of a "position of trust, confidence, or a fiduciary relationship" with regard to the victims. *See Huynh*, 519 N.W.2d at 196 (stating that "enterprise" is an organization whose "members function[ ] under some sort of decisionmaking arrangement or structure"). In addition, the record supports the jury's conclusion that Pratt held a "position of trust, confidence, or a fiduciary relationship" within the mortgage-fraud scheme. As previously observed, the evidence established that Pratt, as a loan officer, submitted loan applications containing false statements to lenders and the loan applications contained warranties and promises that all information in the application was true and accurate. Lenders and borrowers trusted Pratt, as the loan officer, to submit loan applications containing accurate information.

Finally, the district court relied on both specified circumstances when imposing the upward durational departure. Pratt argues that because the district court stated, during sentencing, that the sentence was "based upon the pervasive, sophisticated, extended swindle that occurred, as identified in the complaint," the district court only relied on the high degree of sophistication and length of occurrence in enhancing his sentence. But when instructing the *Blakely* jury, the district court stated that in order to find the aggravating factor of a major economic offense, the jury had to find that both circumstances existed. This indicates that the district court relied on both jury findings when imposing an upward durational departure.

Although Pratt's ten year sentence is severe, "[t]he legislature clearly intended to punish severely those persons who engage in racketeering." *Huynh*, 519 N.W.2d at 198. The penalty our state legislature has imposed for a racketeering conviction is up to 20 years in prison. Minn. Stat. § 609.904, subd. 1 (2006). And the legislature intended to allow courts broad discretion in sentencing for racketeering by making it an unranked crime and subjecting it to the same departure guidelines as other offenses. Minn. Sent. Guidelines II.D. & V (2004). Consequently, courts exercise their discretion twice in sentencing for a racketeering conviction—first by assigning a severity level, and then by deciding whether to depart from the guidelines. Under the facts of this case, the district court did not abuse its broad discretion by imposing an upward durational departure.

IX.

In a pro se supplemental brief, Pratt presents additional claims for review. But his claims are not supported by legal authority or, for the most part, facts in the record.

Consequently, these claims cannot provide a basis for reversal unless prejudicial error is obvious on mere inspection. *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff'd on other grounds*, 728 N.W.2d 243 (Minn. 2007).

Pratt's pro se claims can be reduced to four: (1) the district court performed its duties with bias or prejudice including racial discrimination; (2) the district court abused its discretion when it imposed an upward durational departure; (3) the evidence was insufficient to convict him of theft by swindle; and (4) he received ineffective assistance of counsel.

We have already addressed the presiding judge's alleged conflict of interest, the district court's imposition of an upward durational departure, and the sufficiency of the evidence. And it is not obvious from mere inspection that the district court performed its duties with racial discrimination or that Pratt received ineffective assistance of counsel. Thus, the claims presented in Pratt's pro se supplemental brief do not provide a basis for reversal.

Affirmed in part, reversed in part, and remanded.

Dated:

Judge Michelle A. Larkin

MINGE, Judge (concurring specially)

I concur and write separately to address important dimensions of this appeal. At the outset, I recognize that judges may not act as a consultant for a person and sit on unrelated matters in which that person is a party. The interest in the opportunities for continuing consulting contracts and the perception of that interest and of a favorable working relationship create the appearance of partiality. If such an arrangement exists and by oversight or inadvertence is not recognized, the appearance of impropriety still exists and a judge should recuse or be removed. In all these respects, I agree with the dissent. This being said, the rules and analysis in supreme court opinions control the judgment of this court. As the majority opinion carefully points out, prior decisions of our state's supreme court limit reversal to situations of actual bias or more dramatic appearance of impropriety. On this record, none of the rulings of the district court are suspect. In fact, despite vigorous argument by appellant, I conclude that if the district court had ruled in appellant's favor on these issues, such rulings would have been reversible error. Also, here the appearance of impropriety is substantially more attenuated than what the supreme court has found to require reversal. Thus, I agree with the majority opinion in affirming.

One aspect of this appeal that is troubling is what the district court should do once a judicial conflict is identified. Here, there were vigorous efforts by appellant's counsel to inquire into the conflict and to remove the trial judge. These efforts were addressed to the trial judge and to the chief judge of the district court.

The bias/conflict of interest challenges in this case were essentially an attack on the trial judge and, for most people, such an acrimonious personal challenge is unsettling. The resulting situation reminds one of the adage, "If you shoot the king, shoot to kill." Here, the attack was not successful. I query in this situation whether the judge should at a minimum have recused for sentencing? Here, because the severity level of RICO offenses is not set forth in the sentencing guidelines, it is a discretionary decision by the district court. Although challenges to the sentence are made on appeal, no challenge is made to the severity ranking, which in important respects drove the length of appellant's sentence.

The financial crimes for which appellant was convicted have significant consequences. Indeed, it appears that this country's recent financial and economic collapse was in part attributable to similar practices on a national scale. Criminal prosecution and prison sentences for these illegal practices do not appear to be consistent. I recognize that a $3 million loss is very large. But it appears that the RICO-type activity here is violence-free and relatively simplistic compared to the types of organized criminal activity that gave rise to the RICO laws.

I note that appellant complained that he was not afforded an opportunity for an evidentiary hearing on judicial bias. Here, the trial judge made a statement on the record regarding his limited consulting role with the Hennepin County Attorney's office. In refusing to remove the trial judge, the chief judge denied an evidentiary hearing with the observation that appellant had not identified the nature of information that he wished to develop in an evidentiary hearing. Absent an indication of a need for an evidentiary

hearing, the chief judge was correct in denying the hearing. On appeal, appellant's counsel again expressed need for an evidentiary hearing, but there is still no indication of specific evidentiary matters that would be covered in an evidentiary hearing.

KLAPHAKE, Judge (dissenting)

I respectfully dissent. The facts of this case demonstrate a classic example of the *appearance* of judicial impropriety—the same district court judge who was retained by Hennepin County as an expert witness in a civil matter involving Hennepin County Medical Center presided over a criminal trial in which the Hennepin County Attorney's Office represented the state. Initially, in December 2008, the district court judge was approached by an attorney from the civil division of Hennepin County, Mike Miller, to serve as an expert witness in a civil matter for the county. The judge accepted the county's offer of employment and in February 2009 received a package of confidential materials for the civil matter. Thereafter, in April 2009, the judge accepted an assignment to preside over appellant's criminal trial, which began on June 3, 2009. On July 1, 2009, during the third week of trial, Miller notified the judge to begin preparing his expert witness disclosures in the civil matter. The judge responded by summoning Miller to his courtroom to tell him that he was "too busy" to work on the civil matter. However, while Miller was unable to speak with the judge on July 1, he observed a colleague from the criminal division appearing as the prosecutor in the criminal trial. On July 2, 2009, the prosecutor disclosed the conflict to appellant following discussions among various Hennepin County attorneys. Thereafter, in his first public recognition of the conflict, the judge repudiated the expert witness assignment and, during jury deliberations in the criminal trial, returned confidential documents to the civil division. This scenario is precisely what causes the public to question the impartiality and fairness of the judiciary and judicial proceedings. At a minimum, the judge should have disclosed

his dual roles for the county *prior* to trial and given appellant the opportunity to waive the apparent conflict or seek removal of the judge at that time.

The majority sets out and applies two tests emanating from *Powell v. Anderson*, 660 N.W.2d 107 (Minn. 2003), which address the circumstances under which a judge should be disqualified and whether a judge's failure to self-disqualify requires the reviewing court to vacate the judge's decision. The majority determines that the judge should not have been disqualified here and concludes that under the *Powell* factors, it is unnecessary to vacate the decision. This is where I part company with the majority.

The cases cited by the majority, including *Powell*, involve instances of *actual* impropriety that diffuse the analysis on the issue of the *appearance* of judicial impropriety. I question whether it is appropriate in a case involving solely the appearance of judicial impropriety to consider trial outcome in determining whether to vacate a judicial decision. After all, the *appearance* of judicial impropriety is a vital societal or policy concern, and the actual outcome of a tainted judicial proceeding plays little or no role in remedying the appearance of judicial impropriety. Allowing a judge to preside over a trial under the circumstances presented here is improper, irrespective of the trial outcome.

Even *Powell* and its progeny, however, call for this judge's decision to be vacated. In its test for determining whether vacation is necessary after a judge has failed to self-disqualify, *Powell* considers "the risk of undermining the public's confidence in the judicial process." *Id.* at 121 (quotation omitted). The *Powell* court considered this factor among others in concluding that vacation was required, noting "that the risk of

undermining the public's confidence in the judicial process" was "significant" to its decision. *Id.* at 124. That same risk is present here and also calls for the district court's decision to be vacated.

This case is analogous to *Pederson v. State*, 649 N.W.2d 161, 164 (Minn. 2002), which was decided one year before *Powell*. There, the supreme court did not consider or address whether there was any actual partiality that tainted a postconviction petitioner's rights. *Id.* However, the supreme court reversed the postconviction order "in the interests of justice" when the district court's order exonerated the prosecution of allegations of serious misconduct that was predicated on ex parte findings and conclusions drafted by the prosecution. *Id.* at 164-65. The supreme court noted the purpose of maintaining public trust and confidence in the judiciary, stating: "[i]n its capacity as the neutral factor in the interplay of our adversary system, the court is vested with the responsibility to ensure the integrity of all stages of the proceedings. This pervasive responsibility includes avoidance of both the reality and the *appearance* of any impropriety." *Id.* at 164 (quotations omitted, emphasis added); *see also Scott v. United States*, 559 A.2d 745, 756 (D.C. 1989) (vacating a criminal conviction and remanding for a new trial solely because of the appearance of impropriety of the trial judge, who failed to disclose at the time of trial that he was "seeking or had accepted employment in the executive office for all federal prosecutors while one of those prosecutors was prosecuting [the defendant]"). I would vacate appellant's conviction and remand for trial because of the appearance of judicial impropriety.