STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1514

State of Minnesota,
Respondent,

vs.

Thomas Ray Jackson,
Appellant.

Filed January 22, 2008
Affirmed
Ross, Judge

Stearns County District Court
File No. K5-05-3522

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle Kendall, Stearns County Attorney, 705 Courthouse Square, Room 448, St. Cloud, MN 56303-4773 (for respondent)

John M. Stuart, State Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104, (for appellant)

Considered and decided by Dietzen, Presiding Judge; Ross, Judge; and Harten, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

ROSS, Judge

On appeal from conviction for theft of a motor vehicle, Thomas Ray Jackson argues that the evidence was insufficient to show that the value of the stolen car was $2,500 or more, that evidence of his crimes or bad acts was improperly admitted, that the date of the offense should have been submitted for the jury to determine, and that he was improperly sentenced to 96 months under the career-offender statute. Because the evidence was sufficient to show the value of the car was $2,500 or more and to convict Jackson, and because the trial court did not abuse its discretion by its evidentiary or sentencing decisions, we affirm.

FACTS

On July 30, 2005, Dawn Gustin received a call from a potential buyer for a 1996 Mercury Cougar car that she had listed for sale for $3,750 in the *St. Cloud Times*. The caller, appellant Thomas Jackson, arrived at Gustin's home a short time later. Jackson wanted to get in a "good drive" before he paid for the vehicle, so he asked to drive it for 90 minutes. Gustin asked Jackson to leave his driver's license with her while he test drove the vehicle, but he told her he needed the license in case he got pulled over. Instead, he wrote the name "John Bove," an address, and a cellular telephone number on a piece of paper. Jackson then drove away in Gustin's car, leaving the car he arrived in.

Three hours later, Jackson still had not returned. Gustin called the phone number Jackson gave her, only to find that it was disconnected. Gustin then called the Sauk Rapids police department.

As the responding police officer and Gustin conversed, Gustin saw Jackson drive by in her car. She alerted the officer, but Jackson sped away and the officer was unable to apprehend him.

Two days later shortly after 1:30 in the morning, Albany police officer Kevin Brown noticed the Mercury Cougar and reported to his dispatcher that he was stopping it. The dispatcher informed Officer Brown that the Mercury was reported as stolen. The officer confronted Jackson, who replied that he was just on a test drive. The officer placed Jackson under arrest and seized the Cougar. The car was returned to Gustin, and she eventually sold it for $2,400.

The state charged Jackson with theft of a motor vehicle in violation of Minnesota Statutes section 609.52, subdivisions 2(17) and 3(3)(d)(v). Jackson argued to the district court that the date of the offense was July 30, 2005, and he requested a special interrogatory for the jury to determine the date of the offense. The district court denied this request. At trial, Jackson asserted that his failure to return the car was a mistake. But the district court admitted the state's *Spreigl* evidence to rebut that claim. That evidence consisted of testimony from three different witnesses whom Jackson had contacted to express interest in cars they had advertised for sale in the *St. Cloud Times* in February 2004. Jackson had given a forged check to two of the sellers and failed to return the other's car after a test drive.

The jury found Jackson guilty of theft of a motor vehicle. Jackson waived his right to have the jury decide aggravating factors before sentencing. At sentencing, Jackson argued that he did not qualify as a career offender under Minnesota Statutes

section 609.1095, subdivision 4. The district court found that the career offender statute applied to Jackson, and it sentenced him to 96 months' imprisonment. Jackson appeals from his conviction and sentence.

D E C I S I O N

I

We first address Jackson's claim that the evidence was insufficient to convict him of the theft of a motor vehicle valued at more than $2,500. This court reviews a claim of insufficient evidence to determine whether a factfinder could reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offenses charged in light of the facts in the record and all the legitimate inferences that can be drawn in favor of conviction from those facts. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). Due process requires that the state prove each element of a crime beyond a reasonable doubt. *State v. Costello*, 646 N.W.2d 204, 211 (Minn. 2002). Here, the state was required to prove that Jackson took or drove the Mercury Cougar without consent and that the value of the car was more than $2,500. Minn. Stat. § 609.52, subds. 2(17) and 3(2) (2006); *State v. Winston*, 412 N.W.2d 432, 433 (Minn. App. 1987). Section 609.52 defines value as, "the retail market value at the time of the theft, or if the retail market value cannot be ascertained, the cost of replacement of the property within a reasonable time after the theft."

Jackson contends that the state did not meet its burden of proof that the car's value exceeded $2,500, but we conclude that the facts in the record and the legitimate inferences from those facts support the jury's finding that the car was worth $2,500 or

more. Dawn Gustin advertised the car for sale for $3,750 because the price was midway between the retail value and the private-owner *Kelley Blue Book* value. She testified that the retail market value of the Cougar was $5,010, which was also the fair market value of the car. Gustin has been a car salesperson for five years. She regularly relies on the *Kelley Blue Book* when pricing cars for sale. This is sufficiently reliable testimony to support the estimated market value of the car. Viewing Gustin's testimony in the light most favorable to the verdict, the jury reasonably believed that the Mercury Cougar was worth more than $2,500.

Jackson argues that Gustin's father's testimony that he instructed Gustin to sell the car for anything over $2,000 establishes that the state did not meet its burden of proof. But that testimony reflects only the lowest amount that Gustin's father was willing to accept in exchange for the car, not what he believed the market value to be. This is supported by his testimony in response to a question regarding his desired sale price. Gustin's father answered, "Whatever. It didn't really matter to me. I just needed to get rid of the car." Jackson chose not to cross examine Gustin's father about the market value of the vehicle.

Jackson also highlights that the *Kelley Blue Book* estimate admitted at trial was dated September 17, 2005. But Jackson fails to present any evidence to show that the value of the car on July 30, 2005, was less than the *Kelley Blue Book* estimate of September 17, 2005, and logic would have informed the jury that the car did not appreciate in value over time. Jackson's argument lacks persuasive force.

Finally, Jackson argues that the ultimate, actual sale price of $2,400 shows that the market value on July 30, 2005, could not have been in excess of $2,500. But the car's eventual selling price is not determinative because the owner's position regarding the sale price was that "it didn't really matter" because he "just needed to get rid of" it. There was ample evidence on which the jury could have reasonably concluded that the value of the car was more than $2,500.

II

We next address Jackson's claim that the district court abused its discretion when it admitted evidence of Jackson's prior bad acts. Generally, evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible to prove other things, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 491, 139 N.W.2d at 169.

The district court has broad discretion in determining the admissibility of *Spreigl* evidence. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). This court reviews the trial court's admission of *Spreigl* evidence for an abuse of discretion. *Id.* To prevail on this challenge, Jackson must establish that the district court erred when it admitted the evidence and show actual prejudice caused by that error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Before admitting *Spreigl* evidence, the district court must first determine that (1) the state gave notice of its intent to admit the evidence; (2) the state

clearly indicated what it would offer the evidence to prove; (3) there is clear and convincing evidence that the defendant participated in the prior act; (4) the evidence is relevant and material to the state's case; and (5) the evidence's potential to prejudice the defendant does not outweigh its probative value. *Angus v. State*, 695 N.W.2d 109, 119 (Minn. 2005).

These five requirements were met. The state notified Jackson of its intent to offer the *Spreigl* evidence two weeks before trial, expressly stating that the evidence would be used to prove absence of mistake. Although Jackson admitted at trial there was "no doubt" that he was the one who test drove the vehicle, his opening statement, cross-examination questions, and arguments to the court made plain that his theory of the case was that his failure to return the vehicle at the agreed-upon time was merely a mistake. Jackson had been convicted of the three *Spreigl* incidents, so the evidence of his participation in them was clear and convincing. The district court found that the evidence of the three prior acts was relevant and material to addressing whether Jackson's failure to return the car was merely a mistake.

Jackson contends that the *Spreigl* evidence was not relevant because his case did not turn on credibility. Although he did not testify, his arguments challenged Gustin's account of the events. Defense counsel repeatedly referred to Jackson's failure to return the car to Gustin as a mistake. The use of *Spreigl* evidence is not limited to credibility issues. *See* Minn. R. Evid. 404(b). We agree with the district court that the *Spreigl* incidents were relevant to prove that Jackson's failure to return the Mercury Cougar was no mistake.

Jackson also contends that the district court failed to balance the prejudicial effect of the *Spreigl* evidence against its probative value. The district court "should address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against its potential for unfair prejudice." *State v. Ness*, 707 N.W.2d 676, 690 (Minn. 2006). The court decided that because Jackson argued that he made a mistake, credibility was at issue and the *Spreigl* evidence was probative of that issue and did not outweigh the danger of unfair prejudice. The evidence no doubt prejudiced Jackson, but not unfairly. Jackson contends that the state could have made its point with only two of the prior thefts and that introducing all three was "piling on" with cumulative evidence. But Jackson's infusion of his "mistake" theory was consistent, and it invited the evidence to the contrary in equal measure. The record does not support Jackson's claim that the district court improperly balanced the probative value of the *Spreigl* evidence against its potential for prejudice.

III

Jackson argues that the district court violated his right to have the jury decide the date of the offense. In a pretrial letter brief, Jackson challenged that probable cause existed to find that the date of the offense was on August 1, 2005, and he requested that the district court submit a special interrogatory to the jury to decide the date. The district court denied this request and determined that the offense charged, Minnesota Statutes section 609.52, subdivisions 2(17) and 3(2), required that the jury find that Jackson unlawfully took or drove the vehicle on August 1, 2005. Jackson argues that the trial court's denial violated his right to have the jury determine a necessary element of the

offense. But the state correctly asserts that whether the date of the offense was July 30 or August 1, the career-offender statute in effect on August 1 applied. We therefore do not need to address whether the district court's denial of Jackson's special interrogatory was error because any error was harmless. Additionally, we hold that the sentencing procedure concerning the departure generally was proper and complied with the constitutional requirements of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

In *Blakely*, the Supreme Court held that a district court may not impose a sentence greater than the maximum sentence that may be imposed on the basis of the facts reflected in the jury verdict or as admitted to by the defendant. *Blakely*, 542 U.S. at 303–04, 124 S. Ct. at 2537. Under *Blakely*, the district court may not impose an upward durational departure from the Minnesota Sentencing Guidelines' presumptive sentence based on judicial findings unless the defendant waives his right to a jury determination of the facts on which the departure is based. *State v. Shattuck*, 704 N.W.2d 131, 133 (Minn. 2005); *State v. Hagen*, 690 N.W.2d 155, 158 (Minn. App. 2004). Minnesota Statutes section 609.1095, subdivision 4, in effect on July 30, 2005, provided that a judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the judge determines that the offender has five or more prior felony convictions and if the present offense is a felony that was committed as part of a pattern of criminal conduct. The legislature altered section 609.1095 effective August 1, 2005, to conform to the constitutional requirements of *Blakely* and its progeny to require that the factfinder make those findings. Minn. Stat. § 609.1095, subd. 4

(2005). When a statute has not yet been amended to comply with *Blakely*, the district court has the inherent judicial authority to impanel a sentencing jury. *State v. Kendell*, 723 N.W.2d 597, 610 (Minn. 2006); *State v. Chauvin*, 723 N.W.2d 20, 23-24 (Minn. 2006). Even if the date of the offense was July 30, 2005, the district court had authority to impanel a sentencing jury. Because the district court recognized it had this authority, and because Jackson raises no challenge to the validity of his *Blakely* waiver, we reject his challenge and turn to whether the court abused its discretion when it imposed an upward durational departure.

IV

A trial court has discretion in sentencing decisions, and this court reviews a trial court's departure from the presumptive sentence for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). The application of the career offender statute to Jackson is a question of law, which this court reviews de novo. *State v. Bunde*, 556 N.W.2d 917, 918 (Minn. App. 1996). As noted, a judge may impose an aggravated durational departure if the factfinder finds that the defendant has five or more prior felony convictions and the present offense is a felony that was committed as a pattern of criminal conduct. Minn. Stat. § 609.1095, subd. 4 (2006). A judge may determine whether a defendant has prior convictions without violating the defendant's Sixth Amendment jury-trial rights. *State v. Adkins*, 706 N.W.2d 59, 63-64 (Minn. App. 2005). But a defendant has a right to have a jury determine whether the present offense is a felony that is part of a pattern of criminal conduct. *State v. Henderson*, 706 N.W.2d 758, 762 (Minn. 2005). This determination is a finding of fact and is reviewed for clear error.

Id.; *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). Jackson waived this right and asked the trial court to make the determination of whether or not his conviction for the August 1, 2005, theft of a motor vehicle was part of a pattern of criminal conduct.

Although Jackson contends in his pro se supplemental brief that his criminal history does not show the requisite number of crimes to meet the requirements of section 609.1095 and that the sequencing requirement of *State v. Huston*, 616 N.W.2d 282, 284 (Minn. App. 2000), was not met, this claim has no support in the record. The presentence investigation report establishes that he had the requisite number of prior felonies. It shows that Jackson's criminal history covers more than 26 years and spans 6 states and 15 counties, and it indicates that at least 6 of his 31 crimes were felonies. The state demonstrated that nine of the felony convictions were sequential. The district court also had to find that the August 2005 offense was part of a pattern of criminal conduct. A pattern of criminal conduct may be illustrated by proof of criminal conduct similar in motive, purpose, results, participants, victims, or shared characteristics. *Henderson*, 706 N.W.2d at 761. Jackson's prior convictions included numerous thefts and forgeries. The state pointed out that the majority of these offenses were property offenses and that his swindles demonstrated his motive to enrich himself at the expense of others. Even the three *Spreigl* offenses admitted at trial support the trial court's finding that Jackson has engaged in a pattern of criminal conduct; the theft of the Mercury Cougar in this case appears as one more fruit of the same tree. The trial court did not err by finding that Jackson's auto theft was part of a course of criminal conduct.

Because that finding is factually supported and because Jackson had more than five qualifying prior convictions, it was not an error for the district court to apply the career offender statute. Nor was it an abuse of discretion for the district court to use the career offender statute as the basis for the upward durational sentencing departure.

Affirmed.