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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1268**

State of Minnesota,
Respondent,

vs.

Labaron Sentell Black,
Appellant.

**Filed June 10, 2019
Affirmed
Rodenberg, Judge**

Lyon County District Court
File No. 42-CR-17-893

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Abby Wikelius, Assistant County Attorney, Marshall,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Reyes, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from a judgment of conviction, appellant Labaron Black argues
that the district court committed reversible error by admitting hearsay evidence in the

Blakely phase of appellant's trial, and that the district court's determination that appellant is a career offender must be reversed because the state failed to prove beyond a reasonable doubt that appellant has five or more prior sequential felony convictions. We affirm.

FACTS

Appellant was charged with second-degree assault under Minn. Stat. § 609.222, subd. 1 (2016); threats of violence under Minn. Stat. § 609.713, subd. 3(a)(1) (2016); and domestic assault under Minn. Stat. § 609.2242, subd. 4 (2016), after an August 19, 2017 incident. The state filed notice of its intent to seek an aggravated sentence on the basis that appellant is both a dangerous offender and a career offender under Minn. Stat. § 609.1095, subs. 2, 4 (2016). At a pretrial hearing, appellant waived his right to counsel and chose to represent himself. Appellant also waived his right to a jury trial on guilt and sentencing.

Following a court trial, the district court found appellant guilty of all three of the charged offenses. The district court issued a subsequent order concluding that appellant qualifies as a dangerous offender and a career offender. The district court sentenced appellant to a 50-month prison sentence for the felony domestic assault conviction and an 84-month prison sentence for the second-degree assault conviction, to be served concurrently. No sentence was imposed for the threats-of-violence offense.

This appeal followed.

DECISION

I. The district court did not plainly err by admitting hearsay evidence in the sentencing phase of appellant's trial.

Appellant argues that the district court erred at the sentencing phase of trial by admitting hearsay evidence—the register of actions for at least 13 convictions of misdemeanor and gross misdemeanor offenses, and another court's order and findings on a prior felony conviction. Appellant did not object to the admission of this evidence. And appellant makes no argument on appeal that his waiver of the right to counsel was uninformed or otherwise deficient.

“Appellate review of an evidentiary issue is forfeited when a defendant fails to object to the admission of evidence.” *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). But appellate courts will review forfeited issues for plain error. *Id.* at 650 (citing Minn. R. Crim. P. 31.02). To satisfy the plain-error standard, an appellant must demonstrate that “(1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights.” *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). If these three elements of the plain error test are met, the court then considers whether it should address the error to ensure the fairness and the integrity of the judicial proceedings. *Id.* at 804-05.

Generally, a district court must impose the presumptive guidelines sentence unless there are “identifiable, substantial, and compelling circumstances” to warrant an upward departure. Minn. Sent. Guidelines 2.D.1 (2016). Other than a prior conviction, any fact that increases the penalty for a crime beyond the presumptive sentence must be submitted to a jury and be proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296,

124 S. Ct. 2531 (2004); *State v. Shattuck*, 704 N.W.2d 131, 135, 141 (Minn. 2005). Where the defendant waives his right to have a jury determine whether aggravating factors exist to justify an upward durational departure in his sentence, the defendant is entitled to a court trial before a judge to determine whether the alleged aggravating factors have been proved. *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 327 (Minn. 2016). The rules of evidence apply to a *Blakely* court trial. *Id.* at 330.

The career-offender statute allows the district court to impose an upward durational departure from the guidelines for a felony conviction when an offender has five or more prior felony convictions and the present offense is part of a pattern of criminal conduct. Minn. Stat. § 609.1095, subd. 4. The district court may also impose an upward durational departure under the dangerous-offender statute, which permits durational departures not otherwise authorized by the sentencing guidelines. *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). The dangerous-offender statute allows for an upward departure if (1) the offender was at least 18 years old at the time of the current offense; (2) the current offense is a felony and a violent crime; (3) the offender has two or more prior convictions for violent crimes; and (4) the fact-finder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2.

First, appellant argues that the district court erred by improperly admitting hearsay evidence of his prior convictions. Hearsay is defined as, “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay is not admissible except as provided by the rules of evidence or other rules prescribed by the supreme court or

legislature. Minn. R. Evid. 802. The rules of evidence provide numerous exceptions to the general rule. *See* Minn. R. Evid. 803, 804.

Appellant acknowledges that Minn. R. Evid. 803(22) provides an exception to the rule against hearsay for a prior judgment of conviction entered after trial or upon a plea of guilty to prove any fact essential to sustain the judgment, but only if the crime was punishable by death or imprisonment in excess of one year. Appellant argues that, because his prior convictions for misdemeanors and gross misdemeanors were not punishable by death or imprisonment in excess of one year, this exception does not apply and evidence of those convictions is therefore inadmissible. But even if this particular hearsay exception is inapplicable, that does not necessarily mean that the evidence would not be admissible under any other hearsay exception.

The state agrees with appellant that the register of actions is hearsay. The state argues that the evidence is admissible under the public records exception, which provides:

Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases and petty misdemeanors matters observed by police officers and other law enforcement personnel

Minn. R. Evid. 803(8). The comment to the rule explains that the rationale for this exception rests in a belief in the trustworthiness of the work product of government agents operating pursuant to official duty, the necessity for introducing full reports as opposed to testimony that relies on memory, and a concern for the disruption that would result in

government agencies if employees were continually required to testify in trials. Minn. R. Evid. 803(8) 1989 comm. cmt.

The record here is sparse because appellant did not raise this objection to the district court, but the register of actions is an official record of the clerk of the district court. *State ex rel. Craig v. Tahash*, 116 N.W.2d 657, 660 (Minn. 1962). And every district court is required by law to keep records, including a register of actions. Minn. Stat. §§ 485.07(1), .16, subd. 1 (2018). We see no error in the district court having admitted the register of actions, much less any error that is plain.

Appellant also argues that the district court erred by admitting as evidence a previous district court's judicial findings concerning a prior felony conviction. Appellant provides some persuasive authority holding that prior judicial findings are categorically inadmissible hearsay. *E.g., United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007) (“[J]udicial findings of fact are hearsay, inadmissible to prove the truth of the findings *unless a specific hearsay exception exists.*” (emphasis added)).

The Minnesota Supreme Court has recognized that “[t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the trial court’s decision-making process in either admitting or excluding a given statement.” *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). And the complexity and subtlety of the hearsay rule and its exceptions make it particularly important that a full discussion be had on the record. *Id.* The failure to object to the district court deprives the state of the opportunity to establish that the evidence is admissible under one of the numerous hearsay exceptions, and consequently, an appellate

court will not find plain error if the statements are not “clearly or obviously inadmissible hearsay.” *Id.*; *State v. Smith*, 825 N.W.2d 131, 138 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

Appellant made the informed decision to proceed *pro se* in this matter. The problems of which appellant now complains are due in large part to his not having objected at the district court. Here, the district court had no occasion to consider the admissibility of the claimed inadmissible hearsay. We cannot conclude on this record that the district court’s receipt of evidence in the form of prior judicial findings proving appellant’s prior felony conviction was “clearly or obviously” in error. Consequently, it was not plain error for the district court to admit the prior judicial findings.

Moreover, and even if admitting the prior judicial findings was erroneous and plainly so (which we do not conclude), the error was harmless because appellant meets the dangerous-offender criteria regardless of the challenged evidence. The district court found as fact that appellant has two or more prior convictions for violent crimes. It also found that appellant’s past criminal behavior and the high frequency of his criminal behavior—being convicted of a new offense, in prison, or on warrant status every year since he turned 18 in May 1997—make appellant a danger to public safety. Appellant’s probation officer testified concerning appellant’s criminal history. Accordingly, the district court could have properly determined that appellant is a dangerous offender without regard to the prior judicial findings.

II. The district court did not err in determining that appellant qualifies as a career offender.

Appellant argues that the state failed to prove beyond a reasonable doubt that he qualifies as a career offender because the state did not prove that appellant has five or more prior sequential felony convictions. Specifically, appellant argues that, because the state's evidence only proved the dates on which appellant was charged and sentenced, and not the offense date of each crime, the state failed to prove that his convictions are sequential.

In considering a claim of insufficient evidence, we review the record to determine whether the evidence, when viewed in the light most favorable to the district court's verdict, is sufficient to support the verdict. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). We will not disturb the verdict if the fact-finder, while acting with proper 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. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004).

To support a finding that appellant is a career offender, the state was required to prove that appellant had five or more prior felony convictions and that his present offenses were committed as part of a pattern of criminal conduct. Minn. Stat. § 609.1095, subd. 4. A "pattern of criminal conduct" is established upon "proof of criminal conduct similar, but not identical, in motive, purpose, results, participants, victims or other shared characteristics." *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996). A "prior conviction" is defined as "a conviction that occurred before the offender committed the next felony resulting in a conviction." Minn. Stat. § 609.1095, subd. 1(c) (2016). In order to sentence

pursuant to Minn. Stat. § 609.1095, subd. 4, “five sequential felony offenses and convictions are required (i.e., offense/conviction, offense/conviction, offense/conviction, etc.).” *State v. Huston*, 616 N.W.2d 282, 283-84 (Minn. App. 2000). Accordingly, the state was required to prove the offense and conviction dates of appellant’s prior felony convictions.

Appellant’s argument rests on an unpublished decision of this court, *State v. Jones*, No. A07-2112, 2008 WL 5334401, at *6 (Minn. App. Dec. 23, 2008), where we determined that the state’s evidence was insufficient to support a departure under section 609.1095, subd. 4. There, the state offered several “criminal court case histories” that were received in evidence. *Id.* at *2. We determined that, while those exhibits may “contain” the dates of both the offense and the conviction, they were “insufficient to prove the offense dates.” *Id.* at *6. *Jones* is not binding authority and has persuasive value, “[a]t best.” *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (addressing dangers of miscitation and unfairness associated with the use of unpublished opinions and stating that “[t]he legislature has unequivocally provided that unpublished decisions are not precedential”); see Minn. Stat. § 480A.08, subd. 3 (2018) (stating that unpublished decisions of the court of appeals are not precedential).

Here, each register of actions provided three different dates. First, there is a “Date Filed” for each charge. Second, each charge lists a date under the heading “Date.” Lastly, each charge lists another date under the heading “Disposition.” The central concern in *Jones* was that, while the case histories may have provided both the offense and conviction dates, the state failed to explain how the jury would know the legal significance of the

listed dates. Here, the district court was acting as the fact-finder and could properly discern the offense and conviction dates from the register of actions. Our independent review of the register of actions convinces us that offense dates here were adequately proved in this case.¹

We also observe that the district court's finding that appellant is a dangerous offender provided an independent basis for the sentence. *See Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) (stating that if reasons given justify the departure, the departure will be affirmed); *cf. State v. Rund*, 896 N.W.2d 527, 534-36 (Minn. 2017) (independently examining the record to determine if alternative grounds exist to support the departure). Accordingly, the record adequately supports appellant's sentence.

Affirmed.

¹ We observe in passing that the better practice might well be for the state to offer a more robust explanation of the register of actions than was provided here. Our holding is limited to the particular facts in this appeal.