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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0040**

State of Minnesota,
Respondent,

vs.

Jason Elliott Clark,
Appellant.

**Filed December 20, 2021
Affirmed
Cochran, Judge**

Scott County District Court
File No. 70-CR-20-720

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

Ronald Hovevar, Scott County Attorney, John Patrick Monnens, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Cochran, Judge; and
Cleary, Judge.*

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this direct appeal, appellant challenges his sentence for identity theft. He argues that the district court abused its discretion by imposing an upward durational sentencing departure based on its finding that appellant's identity-theft offense involved an aggravating factor. More specifically, he argues that the district court abused its discretion when it found that appellant's identity-theft offense was a major economic offense supporting an upward departure. Because the district court did not abuse its discretion when it found that appellant's offense met the requirements of this aggravating factor, we affirm.

FACTS

In an amended complaint, the state charged appellant Jason Clark with identity theft resulting in a total loss to the victim of more than \$35,000. The state also charged Clark with three counts of theft by swindle of property exceeding \$5,000 in value, and one count of theft by swindle of property exceeding \$1,000 in value. The identity-theft charge related to J.V. (victim 1), and the theft-by-swindle charges related to two other victims. The case proceeded to a jury trial. The following summarizes the evidence presented at trial relevant to this appeal.

Clark began a romantic relationship with victim 1 in December 2014. A few months later, he moved in with her. Victim 1 testified that Clark used a different name when they first met, spoke in a British accent, and told her that he was from Wales. Clark also told

victim 1 that he had a trust fund and a grant to write a book. Victim 1 later learned that none of this was true.

In the summer of 2017, victim 1 started receiving emails with new credit card statements from four different companies: Capital One, Citibank, Discover, and American Express. Victim 1 asked Clark about the emails. Clark told victim 1 that he had opened the credit cards in his own name but used her email address. Clark also reassured victim 1 that the credit cards were not in her name. In the winter of 2018, victim 1 requested her credit report and saw that credit cards from the same four companies were listed on her credit report. She confronted Clark again. This time he told her that the cards were in both of their names but that he had been making monthly payments and would pay off the balances. When victim 1 eventually called the credit card companies in the summer of 2019, she learned that each account was in her name alone, with Clark listed only as an authorized user on each account.

At trial, the state introduced evidence showing that Clark had applied for a Capital One credit card using victim 1's social security number and other personal identifying information. Victim 1 never gave Clark her social security number or permission to use it, and she never authorized Clark to open any credit cards in her name. Clark later admitted that he took victim 1's social security number from her tax records.

Between May 2017 and January 2020, Clark charged about \$18,500 to the Capital One credit card, over \$16,500 to the American Express card, over \$11,000 to the Discover card, and over \$12,000 to the Citibank card. These charges amounted to more than \$58,000.

Clark began a relationship with a second victim (victim 2) in February 2018. Victim 2 testified that Clark initially used a different name, spoke with a British accent, and told her that he was from Wales. Clark also said he had a book deal and had inherited a trust fund. Clark repeatedly asked victim 2 for money. She complied with his requests, expecting him to pay her back with money from his book deal and trust fund. Clark continually promised to pay her back but did not follow through on his promises. Victim 2 gave Clark more than \$28,000 between March and September 2018, about \$38,500 between October 2018 and April 2019, and over \$36,000 between May and November 2019.

A third victim (victim 3) testified to a similar series of events. Victim 3 testified that she met Clark in 2017. Clark again used a different name, spoke with a British accent, told her he was from Wales, and said he was a technical writer. Victim 3 gave Clark a total of \$4,600, expecting him to pay her back with proceeds from his writing. He did not pay her back.

The jury found Clark guilty of one count of identity theft under Minn. Stat. § 609.527, subd. 2 (2016), and four counts of theft by swindle under Minn. Stat. § 609.52, subd. 2(a)(4) (2016). The identify-theft offense related to victim 1, and the jury specifically found that the offense resulted in a total loss of more than \$35,000 to victim 1. The theft-by-swindle offenses related to the other two victims.

Prior to trial, the state filed notice of its intent to seek an aggravated sentencing departure. At trial, Clark waived his *Blakely* jury trial rights, agreeing to have the district court make findings regarding any aggravating sentencing factors. In posttrial briefing, the

state sought an upward departure on three of the counts—the identity-theft count and two of the theft-by-swindle counts. The state argued that each of the three counts involved the same aggravating sentencing factor—namely, each count constituted a major economic offense. Clark opposed the state’s request, arguing that his acts did not constitute major economic offenses that supported an upward sentencing departure.

The district court found, based on the trial evidence, that all three counts were major economic offenses that supported an upward sentencing departure. Specifically, the district court found that each offense involved two or more of the major-economic-offense circumstances under Minn. Stat. § 244.10, subd. 5a(a)(4) (2016), and therefore each offense involved an aggravating sentencing factor. The district court, however, only imposed an upward sentencing departure on the identity-theft count. On that count, the district court sentenced Clark to 220 months in prison—an upward durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines.

This appeal follows.

DECISION

The sole issue on appeal is whether the district court abused its discretion by imposing an upward durational sentencing departure when it sentenced Clark on his felony identity-theft offense. The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5(2) (2020). The sentencing guidelines also provide a nonexclusive list of aggravating factors that may support an upward departure from the presumptive sentence, including the commission of a major

economic offense. Minn. Sent. Guidelines 2.D.3.b(4) (2016); *see also* Minn. Stat. § 244.10, subd. 5a(a) (2016) (identifying the same aggravating factors).

In a challenge to the district court’s decision to impose an upward sentencing departure, “[w]e review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court abuses its discretion when its reasons for departure are legally impermissible or there is insufficient evidence in the record to justify the departure. *See id.*

The district court found that Clark’s felony identity-theft offense was a major economic offense that supported an upward departure as an aggravating factor. The sentencing guidelines provide that a major economic offense that includes at least two of the circumstances listed in the guidelines is an aggravating factor for sentencing purposes. Minn. Sent. Guidelines 2.D.3.b(4); *see also* Minn. Stat. § 244.10, subd. 5a(a)(4) (including identical language). A major economic offense is defined 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.” Minn. Sent. Guidelines 2.D.3.b(4). The listed circumstances include:

- (a) the offense involved multiple victims or multiple incidents per victim;
- (b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
- (c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
- (d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or

(e) the defendant has been involved in other conduct similar to the current offense as evidenced by findings of civil or administrative law proceedings or the imposition of professional sanctions.

Id.; see Minn. Stat. § 244.10, subd. 5a(a)(4)(i)-(v) (listing the same circumstances).

Here, in explaining its upward sentencing departure for the identity-theft offense, the district court first found that the identity-theft offense met the definition of a major economic offense. The district court then found that three of the listed circumstances were met with regard to the offense—multiple incidents per victim, a high degree of sophistication or planning and occurring over a lengthy period of time, and the use of a position of trust. Specifically, the district court found that (1) the identity-theft offense involved multiple incidents against one victim because Clark opened four credit cards using victim 1’s identity and charged many transactions to those cards; (2) the offense involved a high degree of sophistication or planning and occurred over a lengthy period of time because Clark engaged in a sophisticated deception over multiple years; and (3) Clark used the trust and confidence of his relationship with victim 1 to facilitate the identity theft.

Clark argues that the district court abused its discretion when it found that these three circumstances were met and, accordingly, he seeks reversal and remand for resentencing. We address Clark’s arguments regarding the circumstances found by the district court below.

Multiple Incidents Per Victim

Clark first contends that the district court abused its discretion when it characterized his identity-theft crime as involving multiple incidents. Clark argues that he committed

only a single incident of identity theft—specifically, “obtaining and possessing the social security number from [victim 1’s] tax records with the intent to use it for unlawful activity.” He contends that his later use of multiple credit cards, opened with victim 1’s personal information, “did not transform the offense into more than one incident.” On this basis, he argues that the district court abused its discretion when it found that the offense involved multiple incidents. We are not persuaded.

Under Minnesota law, “[a] person who transfers, possesses, *or uses* an identity that is not the person’s own, with the intent to commit, aid, or abet any unlawful activity is guilty of identity theft.” Minn. Stat. § 609.527, subd. 2 (emphasis added). The statute defines “identity” to include a social security number. *Id.*, subd. 1(d)(1) (2016). In addition, the statute sets forth different potential penalties for the offense depending on the amount of money involved and the number of victims involved. *Id.*, subd. 3 (2016).

Here, as indicated on the verdict form, the jury found Clark guilty of felony identity-theft with a resulting total, combined loss to victim 1 of more than \$35,000. To conclude that there was a loss of more than \$35,000 resulting from the offense, the jury necessarily found that Clark did more than simply possess victim 1’s identity. The jury must also have found that Clark used victim 1’s identity in an unlawful manner that resulted in victim 1 losing more than \$35,000. In other words, the jury convicted Clark of *using* victim 1’s identity, not simply *possessing* it. And because the monetary threshold found by the jury—\$35,000—is greater than the amount charged by Clark to any single credit card in a single transaction, he must have used victim 1’s identity multiple times.

Therefore, the district court did not abuse its discretion by considering Clark's use of victim 1's identity when determining whether his offense involved multiple incidents.

We are not persuaded otherwise by Clark's reliance on *State v. Moua*, 874 N.W.2d 812 (Minn. App. 2016), *rev. denied* (Minn. Apr. 19, 2016). Clark contends that *Moua* stands for the proposition that identity theft can occur upon the initial theft of a person's private information and does not require a showing of economic loss for the offense to be completed. Clark's argument is unconvincing because *Moua* did not address the issue raised in this case. *Moua* addressed the question of whether individuals who had their private information stolen were entitled to restitution under Minn. Stat. § 609.527, subd. 4(b) (2012), even in the absence of evidence of economic loss. 874 N.W.2d at 817. Although *Moua* establishes that the theft of private information alone is sufficient to constitute the offense, it does not preclude courts from considering a defendant's subsequent use of that information for sentencing purposes. Therefore, Clark's reliance on *Moua* is misplaced.

Finally, the record amply supports the district court's finding that Clark's crime of identity theft involved multiple incidents. At trial, victim 1 testified that Clark opened four credit cards in her name. Records from the credit card companies show that Clark charged over \$58,000 to the four different credit cards, and there were numerous transactions on each card. This evidence supports the district court's finding that Clark's conduct "spanned four credit cards . . . and a multitude of transactions." And because the district court properly considered Clark's use of victim 1's identity, not just Clark's possession of

victim 1's identity, the district court did not abuse its discretion when it found that Clark's offense involved multiple incidents.

High Degree of Sophistication or Planning and Lengthy Period of Time

Turning to the second circumstance found by the district court, Clark argues that the district court abused its discretion when it found that his identity-theft offense involved a high degree of sophistication or planning and occurred over a lengthy period of time. Clark bases this argument on the same theory as his previous argument—that he completed the crime of identity theft as soon as he possessed victim 1's identity, and therefore the district court erred by considering any events that followed. Based on this contention, Clark argues that the record does not support the district court's finding because “there is no actual evidence that the act of obtaining [victim 1's] social security number was highly premeditated or required complicated planning or scheming.” And he argues that even though the credit card transactions resulting from his theft of victim 1's social security number occurred over a lengthy period of time, the initial theft of her social security number was limited in time. On this basis, he argues that the district court's finding that the identity theft involved a high degree of sophistication or planning and occurred over a lengthy period of time is unsupported by the evidence in the record. We are not persuaded.

For the reasons discussed above, we conclude that the district court properly considered Clark's use—rather than just his possession—of victim 1's identity in analyzing whether the identity-theft offense involved a high degree of sophistication or planning and whether it occurred over a lengthy period of time. We further conclude that the record amply supports the district court's finding that it did. The record shows that Clark lied to

victim 1 about his job, background, and nonexistent trust fund throughout his multi-year relationship with victim 1. He created a false backstory and persona that allowed him to gain access to victim 1's personal identifying information and open credit cards in her name. The record further shows that Clark was able to use those credit cards on numerous occasions from 2017 to 2019 and conceal his fraud even after victim 1 started receiving suspicious emails about unfamiliar credit card statements. As the district court noted, Clark's acts "were built on and enabled by a sophisticated deception carried out over several years." The record fully supports the district court's finding that Clark's offense involved a high degree of sophistication or planning and occurred over a lengthy period of time.

Moreover, the district court's finding is consistent with similar findings in other cases which have been affirmed on appeal. *See, e.g., State v. Thompson*, 720 N.W.2d 820, 830-31 (Minn. 2006) (affirming finding a high degree of sophistication and planning in a theft by swindle where finance manager stole money by manipulating terminated employees' payroll accounts and immediately removing the accounts in order to conceal the scheme), *rev. denied* (Minn. Sept. 17, 2002); *State v. Simmons*, 646 N.W.2d 564, 568-69 (Minn. App. 2002) (affirming finding a high degree of sophistication and planning in a car-flipping scam using false driver's licenses and counterfeit checks); *State v. O'Brien*, 429 N.W.2d 293, 296 (Minn. App. 1988) (concluding that thefts committed over three months occurred over a lengthy period of time), *rev. denied* (Minn. Nov. 16, 1988). Therefore, the district court did not abuse its discretion when it found that

Clark's conduct involved both a high degree of sophistication or planning and occurred over a lengthy period of time.

Conclusion

Having determined that the record supports the district court's findings on the two major-economic-offense circumstances discussed above, we need not address the third circumstance (use of a position of trust) found by the district court. A major economic offense with the presence of two of the listed circumstances is sufficient to support an upward sentencing departure. Minn. Sent. Guidelines 2.D.3.b(4); Minn. Stat. § 244.10, subd. 5a(a)(4); *Thompson*, 720 N.W.2d at 829. We therefore conclude that the district court did not abuse its discretion when it found that Clark's identity-theft offense involved an aggravating sentencing factor that supports an upward departure. Accordingly, we affirm the sentence imposed by the district court.

Affirmed.