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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2112**

State of Minnesota,
Respondent,

vs.

Michael Kevin Jones,
Appellant.

**Filed December 23, 2008
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Dakota County District Court
File No. K4-07-569

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Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Harten,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant requests reversal of his conviction and sentence for unauthorized use of a motor vehicle, arguing that (1) the district court erred when it determined that the state's peremptory challenge of a venire member was not racially discriminatory, (2) there was insufficient evidence to sustain the jury's finding of a fact necessary for the district court's sentencing departure, and (3) the district court abused its discretion by admitting certain evidence during appellant's sentencing trial. Because the state did not engage in racial discrimination during jury selection, we affirm appellant's conviction. But because there was insufficient evidence for the jury to find that appellant had the number of prior felony convictions necessary for a sentencing departure pursuant to Minn. Stat. § 609.1095, subd. 4 (2006), we reverse and remand for resentencing.

FACTS

Appellant was charged with unauthorized use of a motor vehicle in violation of Minn. Stat. § 609.52, subds. 2(17), 3(3)(d)(v) (2006), receiving stolen property in violation of Minn. Stat. §§ 609.53, subd. 1, 609.52, subd. 3(3)(d)(v) (2006), and theft in violation of Minn. Stat. § 609.52, subds. 2(1), 3(5) (2006) based upon conduct that occurred on February 8, 2007. The case proceeded to a jury trial. During voir dire, the district court asked whether the prospective jurors, or any of their family or close friends, had ever been charged with a crime. Venire member number 17 stated that her son had been charged with crimes "numerous times" as a juvenile, but that she believed the experience would not impact her ability to be fair. Venire member number 19 indicated

that her brother was charged with a crime 30 years ago, but that she believed her brother was treated fairly and that his charge would not affect her decision in the present case. Venire member number 23 indicated that an uncle on her husband's side of the family had been charged with an offense, but that the uncle's experience would not affect her ability to be fair.

Venire member number six stated that his nephew had been charged with burglary seven years ago in Minnesota. He stated that he was unsatisfied with the results of that case because the prosecution did not look at all of the evidence. He denied being skeptical of the process and acknowledged that every case is different.

The state subsequently made a peremptory challenge to venire member number six and appellant raised a *Batson*¹ challenge. Appellant argued that the state's decision to remove venire member number six was motivated by race: appellant is African-American and venire member number six was the only African-American venire member.

The state offered the following reasons for its peremptory challenge: (1) the venire member's nephew was convicted of burglary seven years ago; (2) the venire member was unsatisfied with the results; (3) the venire member felt the prosecution had not done their job or they had not done a thorough investigation; and (4) the venire member cited a news agency report that referenced exculpatory evidence in his nephew's case. The prosecutor was not convinced that the venire member could put his experience aside and refrain from speculating about the possible existence of exculpatory evidence. The

¹ See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

prosecutor argued that he would strike any prospective juror who made remarks similar to those of venire member number six.

The district court concluded that appellant had not made a prima facie showing of discrimination, noting that the state's removal of the only minority venire member was insufficient to establish a prima facie case of discrimination. The district court nonetheless offered appellant the opportunity to argue that there was purposeful discrimination and that the state's reasons for the peremptory challenge were pretextual. Appellant offered no argument in response. The district court denied the *Batson* challenge.

At the conclusion of the trial, the jury found appellant guilty of unauthorized use of a motor vehicle, receiving stolen property, and theft. Because the state had requested an upward sentencing departure, the district court held a sentencing trial. The state offered a certified copy of the following documents at the sentencing trial:

- (1) Hennepin County criminal court case history for a misdemeanor theft charge dated October 26, 1987;
- (2) Hennepin County criminal court case history for a theft charge dated February 4, 1988;
- (3) Hennepin County criminal court case history for a theft of motor vehicle charge dated December 30, 1989;
- (4) Hennepin County criminal court case history for either an aggravated robbery or attempted aggravated robbery charge dated January 13, 1992;
- (5) Hennepin County criminal court case history for a receiving stolen goods charge dated November 29, 1994;
- (6) Hennepin County criminal court case history for a receiving stolen property charge dated October 13, 1997;

- (7) Dakota County complaint charging appellant with receiving stolen property from an offense on April 13, 1999, and appellant's sentencing order, plea hearing transcript, and plea petition;
- (8) Ramsey County complaint charging appellant with theft of motor vehicle from an offense on January 19, 2001, and appellant's plea petition, plea hearing transcript, probation referral judgment upon conviction/warrant of commitment form, TCIS case summary, and sentencing transcript; and
- (9) Ramsey County complaint charging appellant with theft of a motor vehicle from an offense dated December 16, 2003, and appellant's plea petition, probation referral judgment upon conviction/warrant of commitment form, and TCIS case summary.

Appellant's counsel agreed that portions of the certified copies of the documents were admissible, but objected to admission of irrelevant information and argued that all irrelevant information should be redacted. The district court overruled appellant's objection.

At the sentencing trial, the district court instructed the jury to determine whether appellant had five or more prior felony convictions, and if so, whether the present offense was committed as part of a pattern of criminal conduct. The jury returned a special verdict finding that appellant had five or more prior convictions and that the present offense was committed as part of a pattern of criminal conduct. After the jury returned its verdict, the district court discharged the jury. The district court then called appellant to the stand, placed appellant under oath, and solicited admissions regarding appellant's conviction history.²

² An off-the-record discussion preceded appellant's admissions. It is unclear why the district court called appellant to the stand for questioning regarding his criminal history after the jury had returned its special verdict. The record does not contain a waiver of

The court continued the case for a presentence-investigation report and sentencing. At the sentencing hearing, appellant argued for the presumptive sentence of 30 months. The district court sentenced appellant to 60 months in prison, an upward durational departure based on the jury's findings at the sentencing trial. This appeal follows.

D E C I S I O N

Appellant challenges (1) the district court's determination that the state's peremptory challenge to venire member number six was not racially discriminatory, (2) the sufficiency of the evidence to sustain the jury's finding that appellant had five or more prior felony convictions, and (3) the district court's evidentiary ruling at appellant's sentencing trial.

Batson Challenge

The Equal Protection Clause of the United States Constitution prohibits the use of a peremptory strike based on a prospective juror's race. *Batson*, 476 U.S. at 86, 106 S. Ct. at 1717. "Whether there is racial discrimination in the exercise of a peremptory challenge is a factual determination to be made by the district court and is entitled to great deference on review." *State v. Taylor*, 650 N.W.2d 190, 200-01 (Minn. 2002); *see also State v. James*, 520 N.W.2d 399, 403-04 (Minn. 1994) (stating that the district court's determination will turn largely on an evaluation of credibility). "[T]he district

appellant's right to a jury determination of the facts necessary to support an upward departure. *See State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008) (stating "[p]ost-*Blakely*, unless waived by the defendant, the fact-finding function is performed by the jury.").

court's determination will not be reversed unless it is clearly erroneous." *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001); *see also James*, 520 N.W.2d at 404.

A three-step process is used to determine whether a party's peremptory challenge was racially discriminatory. *Batson*, 476 U.S. at 96-98, 106 S. Ct. at 1723-24. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. *Id.* A prima facie case of purposeful discrimination requires a showing that a member of a racial group has been peremptorily excluded from the jury and that the circumstances of the case raise an inference that race motivated the exclusion. *Id.* at 96, 106 S. Ct. at 1723; *State v. DeVerney*, 592 N.W.2d 837, 843 (Minn. 1999). Second, the proponent of the strike must provide a race-neutral explanation. *Batson*, 476 U.S. at 97-98, 106 S. Ct. at 1723-24. Race-neutral explanations need not be "persuasive." *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003) (quotation omitted). Rather, the explanation will be deemed race-neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995) (quotation omitted). If a race-neutral explanation is provided, the district court must determine whether there has been purposeful discrimination. *Batson*, 476 U.S. at 96-98, 106 S. Ct. at 1724.

Even though the district court concluded that appellant failed to make a prima facie showing of racial discrimination, the district court conducted a full *Batson* analysis and determined that the state had offered a race-neutral explanation for its peremptory challenge and that appellant had not shown purposeful discrimination. We agree.

“[T]he sole fact that the prospective juror was a member of a racial minority” is insufficient to establish a prima facie claim of racial discrimination. *Reiners*, 664 N.W.2d at 832. Appellant argues that there is an inference of discrimination because the prosecutor chose not to question any other prospective jurors whose family members were involved in criminal cases. But only venire member number six expressed dissatisfaction with how his relative’s case was handled. The prosecutor’s questioning of venire member number six was not unusual given the venire member’s response to the court’s inquiry. The district court properly concluded that appellant did not make a prima facie showing of racial discrimination.

Further, we agree that the state offered a race-neutral reason for striking venire member number six. The Minnesota Supreme Court has consistently held that “a family member’s involvement with the legal system is a legitimate race-neutral reason for the state to exercise a peremptory challenge.” *Id.* (citing *State v. Martin*, 614 N.W.2d 214, 222 (Minn. 2000); *State v. Greenleaf*, 591 N.W.2d 488, 501 (Minn. 1999); *State v. Scott*, 493 N.W.2d 546, 549 (Minn. 1992)).

After the state offered a race-neutral explanation for its peremptory challenge, the district court asked appellant for argument regarding purposeful racial discrimination. Appellant offered none. Because “[the] findings related to pretext are fact determinations that should be given great deference on appeal,” and appellant does not offer argument on this issue on appeal, we conclude that appellant did not meet his burden of showing purposeful discrimination. *State v. Bailey*, 732 N.W.2d 612, 619 (Minn. 2007).

The district court did not clearly err in its determination that the state's peremptory challenge to venire member number six was not racially discriminatory. We therefore affirm appellant's conviction.

Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to sustain the jury's finding that appellant had five prior felony convictions—a finding necessary for the district court's sentencing departure. Every fact that increases a criminal sentence above the presumptive sentence provided by statute must be proved beyond a reasonable doubt. *State v. Shattuck*, 704 N.W.2d 131, 135, 141 (Minn. 2005). The supreme court has analogized a sentencing trial to a trial on the elements of a substantive offense. This suggests that the standard of review to be used when determining whether evidence is sufficient to support a finding of an aggravating sentencing factor should be the same as the standard used to determine whether evidence is sufficient to support a guilty verdict. *See State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). Accordingly, we apply the sufficiency-of-the-evidence standard when reviewing appellant's claim that the evidence was insufficient to sustain the finding necessary for a sentencing departure.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to permit the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume the jury believed the state's evidence and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court

will not disturb the verdict if the jury, acting with due regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense or, in this case, that the aggravating sentencing factor existed. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant's sentencing departure was pursuant to Minn. Stat. § 609.1095, subd. 4 (2006), which states:

Whenever a person is convicted of a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment sentence, the judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of 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. Mitchell*, 687 N.W.2d 393, 399-400 (Minn. App. 2004), *review granted* (Minn. Dec. 22, 2004), *review denied* (Minn. Dec. 13, 2005). But a defendant has a right to have a jury determine whether the present offense is a felony that was committed as part of a pattern of criminal conduct. *State v. Henderson*, 706 N.W.2d 758, 762 (Minn. 2005) (recognizing Sixth Amendment rights in sentencing departures under Minn. Stat. § 609.1095). 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). In the instant case, the

jury was asked to decide both whether appellant had five prior felony convictions and whether the current offense was committed as part of a pattern of criminal conduct.

In support of appellant's challenge to the sufficiency of evidence, appellant asserts that *State v. Crocker*, 409 N.W.2d 840 (Minn. 1987) and *State v. Halliburton*, No. A06-471, 2007 WL 1673702 (Minn. App. June 12, 2007), *review denied* (Minn. Aug. 21, 2007) require the state to offer certified copies of judgments of convictions or plea hearing transcripts to prove prior convictions beyond a reasonable doubt. We disagree. *Crocker* concerned the manner by which prior offenses are proven for the purposes of Minn. R. Evid. 404(b). 409 N.W.2d at 844. In *Crocker*, the state offered a complaint and sentencing documents to prove a prior conviction. *Id.* at 843. The Minnesota Supreme Court concluded, "[i]n this case, particularly given the defendant's lack of objection, it was entirely proper for the trial court to allow the state to use certified court records to prove the [prior] offense." *Id.* at 844. *Halliburton* is an unpublished opinion, and it lacks precedential authority. Minn. Stat. § 480A.08, subd. 3(c) (2006); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (addressing dangers of miscitation and unfairness associated with use of unpublished opinions and stating that "[t]he legislature has unequivocally provided that unpublished opinions are not precedential").

However, we agree with appellant's assertion that the Hennepin County criminal court case histories were insufficient to prove appellant's prior convictions beyond a reasonable doubt. Minn. Stat. § 609.1095, subd. 1(c) (2006) defines "prior conviction" as: "a conviction that occurred before the offender committed the next felony resulting in a conviction and before the offense for which the offender is being sentenced under this

section.” This court has held that “five sequential felony offenses and convictions are required (i.e., offense/conviction, offense/conviction, offense/conviction, etc.)” in order to sentence pursuant to Minn. Stat. § 609.1095, subd. 4. *State v. Huston*, 616 N.W.2d 282, 283-84 (Minn. App. 2000) (noting “the sequencing requirement better serves the general purpose of the statute by permitting five full ‘postconviction opportunities for reform’” and the “sequencing requirement also excludes prejudicial use of multiple convictions resulting from a short crime spree”) (citation and quotation omitted). Thus, the state had to prove the offense and conviction dates of appellant’s alleged prior felony convictions.

Appellant argues that the case histories are insufficient to establish the offense dates because the case histories do not identify the offense dates. Respondent argues that the case histories contain both the offense and conviction dates. While this may be true, we cannot affirm this fact. Although the dates of conviction are discernible from the case histories because the dates of appellant’s guilty pleas and sentences are clearly identified, the offense dates are not. The case histories commence with a designation of the level and type of crime followed by a date. But this date is not accompanied by any identifying information. And no testimony was offered to explain whether this date is the date of offense.³ Respondent fails to articulate how the jury would know that this is the offense date absent any identifying information within the case history or other evidence explaining the date notation in the case history. Without additional evidence to establish that the offense date is contained within the case histories, the case histories are

³ We cannot simply assume that this is the offense date.

insufficient to prove the offense dates, and therefore appellant's "prior convictions," beyond a reasonable doubt.

Respondent contends that appellant waived this argument because he did not argue that his convictions were not sequential at trial. This contention is without merit. In his closing argument to the jury at the sentencing trial, defense counsel stated:

[Y]ou are just going to have to go through [the exhibits received into evidence] piece by piece, see what the state has given to you, if there are, in fact, five prior felony convictions, where a conviction resulted and he was sentenced, and then another crime was committed. So you have to make sure that the crime was committed after he was sentenced on the prior one and also whether or not the crimes relate to each other in a type of pattern, are they similar in conduct or motive or manner.

Appellant thereby demanded that the state prove the facts necessary for an upward departure, including the existence of the requisite number of prior felony convictions as defined by law.

Respondent also argues that collateral estoppel bars appellant from challenging the existence of his prior convictions and the corresponding offense dates. Respondent cites *Crocker*, which quotes *Federal Practice and Procedure* in a parenthetical, for the proposition that "under general principles of collateral estoppel a defendant would be precluded from disputing the ultimate facts necessary to the [prior] conviction." 409 N.W.2d at 844 (quoting 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5249 (1978)). While defendant might be barred from denying the fact of his prior convictions and even the corresponding offense dates, the "factfinder" must determine that an offender has five or more prior convictions in order to sentence pursuant to Minn.

Stat. § 609.1095, subd. 4.⁴ The district court instructed the jury to determine whether appellant had five or more prior felony convictions, which necessarily required a finding regarding the offense dates. Minn. Stat. § 609.1095, subd. 1(c). Respondent did not object to the submission of this issue to the jury. We therefore hold the state to its burden of proof on this issue. The fact that appellant made sworn admissions establishing his convictions and corresponding offense dates after the jury returned its verdict cannot sustain the verdict when those admissions were not presented to the jury.

Without the Hennepin County criminal court case histories, the evidence was insufficient to establish that appellant had five prior felony convictions. Because there was insufficient evidence to sustain the jury's finding on this issue, the evidence does not support a sentencing departure pursuant to section 609.1095, subdivision 4. We therefore reverse appellant's sentence and remand for resentencing consistent with this opinion.

Evidentiary Rulings

Appellant argues that the district court abused its discretion by admitting prejudicial evidence at appellant's sentencing trial. Appellant contends that the evidence was irrelevant and that its prejudicial effect outweighed any probative value. We recognize that the Minnesota Supreme Court has recently held that the Minnesota Rules of Evidence apply in jury sentencing trials. *State v. Rodriguez*, 754 N.W.2d 672, 683-84

⁴ While it might have been permissible for the district court to make findings regarding the existence of appellant's prior convictions and the corresponding offense dates, and to present these findings to the jury for their use in determining whether appellant's offense was committed as part of a pattern of criminal conduct, *see Mitchell*, 687 N.W.2d at 399-400, that is not what happened here.

(Minn. 2008). However, we decline to address appellant's evidentiary arguments given our reversal of appellant's sentence on other grounds.

Affirmed in part, reversed in part, and remanded.

Dated: _____

The Honorable Michelle A. Larkin
Minnesota Court of Appeals