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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-600**

State of Minnesota,
Respondent,

vs.

John Edward Outlaw,
Appellant.

**Filed January 12, 2010
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. 62K706002521

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie Wolf, Interim Chief Public Defender, Roy Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's determination on remand that he has the requisite number of felony convictions to support sentencing under the career-offender statute. Appellant argues that the district court exceeded this court's mandate when it permitted the state to introduce evidence of two felony convictions that were not introduced at the original sentencing hearing. Appellant also argues that (1) his *Blakely* rights were violated by introduction of the additional felony convictions; (2) the jury's finding of a pattern of criminal conduct is no longer valid; and (3) his criminal history score is not accurate. We affirm.

FACTS

Appellant John Edward Outlaw was convicted of first-degree burglary. After a *Blakely* sentencing hearing, the jury found that Outlaw committed the burglary as part of a pattern of criminal conduct, based on evidence of eleven prior convictions, ten of which involved burglary, receiving stolen property, or theft. The district court sentenced Outlaw under the career-offender statute¹ to the maximum sentence: twenty years in prison.²

¹ Minn. Stat. § 609.1095, subd. 4 (2006) (the career-offender statute) permits a sentencing court to depart from the presumptive guidelines sentence "if . . . the offender has five or more prior felony convictions and . . . the present offense is a felony that was committed as part of a pattern of criminal conduct."

² Minn. Stat. § 609.582, subd. (1) (2006) (authorizing a maximum sentence of 20 years for a first-degree burglary conviction).

On appeal, this court affirmed the conviction and affirmed the jury's determination that Outlaw's prior convictions demonstrated a pattern of criminal conduct. *State v. Outlaw*, 748 N.W.2d 349, 357 (Minn. App. 2008), *review denied* (Minn. Jul. 15, 2008). We noted that the record established that Outlaw had four prior felony convictions, but because the state failed to prove that any of the remaining seven prior convictions are felonies under Minnesota law, we remanded to permit the state to "further develop the sentencing record so that the district court can appropriately make its determination" of whether Outlaw has "the requisite number of prior felony convictions to support an aggravated sentence." *Id.* at 356.

On remand, the district court permitted the state to introduce evidence, not offered at the original sentencing hearing, of a 1986 conviction of burglary from Georgia and a 1976 conviction for possession of LSD from North Carolina. Outlaw does not dispute that these convictions are felonies under Minnesota law, but objected to the introduction of additional convictions on remand. His objection was overruled. Outlaw also argued that because of the newly admitted convictions, a new jury needed to be convened on the issue of "pattern of criminal conduct." The district court rejected Outlaw's argument and concluded that, because the state proved that Outlaw has six prior felony convictions, the career-offender sentence should remain as originally imposed. This appeal followed.

DECISION

I. The district court's admission of additional convictions was consistent with our mandate on remand.

“Appellate courts review a district court’s compliance with remand instructions under the deferential abuse of discretion standard.” *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). Outlaw argues that our mandate requiring further development of the sentencing record was limited to introduction of evidence related to the seven out-of-state convictions at issue in his first appeal and whether at least one of those convictions constituted a felony under Minnesota law. Therefore, Outlaw contends, the district court abused its discretion by accepting and relying on evidence of the Georgia and North Carolina convictions, which were not introduced in the original sentencing, to resentence him under the career-offender statute. We disagree.

It is the district court’s duty on remand to execute the appellate court’s mandate strictly according to its terms. *Halverson v. Vill. of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). But “where the remand of [a] case to the [district] court is without any express directions the [district] court is free to proceed in any manner not inconsistent with the opinion.” *Jon Wright & Assocs. v. City of Red Wing*, 256 Minn. 101, 102, 97 N.W.2d 432, 434 (1959) (holding that the district court did not proceed in a manner inconsistent with the supreme court’s opinion). In this case, nothing in the remand mandate precluded the introduction of additional convictions. We permitted the state to “further develop the sentencing record so that the district court c[ould] appropriately make its determination” under the career-offender statute. *Outlaw*, 748 N.W.2d at 356.

And we specifically defined the “determination” as “whether appellant has the requisite number of prior felony convictions to support an aggravated sentence” rather than whether any of the seven convictions introduced in the original sentencing hearing was a felony under Minnesota law. *Id.*

Outlaw argues that, by introducing the Georgia and North Carolina convictions at resentencing, the state was taking a “second bite at the apple.” In *State v. Roman Nose*, the supreme court addressed the policy considerations behind the requirement that district courts adhere to the strict terms of the remand, and stated “[i]f we were to consider additional evidence presented *beyond the issue to be determined on remand*, the parties might consider the remand proceedings to be a ‘second bite at the apple’ and attempt to further litigate all issues in the case.” 667 N.W.2d 386, 394–95 (Minn. 2003) (emphasis added). But, here, the state did not introduce evidence beyond the issue to be determined on remand. The new evidence was aimed directly at the question on remand: whether Outlaw had the requisite number of felony convictions to support an aggravated sentence under the career-offender statute.

Outlaw asserts that “a remand for more than anything other than addressing the validity of the seven contested foreign convictions raises a host of problems related to Appellant’s Sixth Amendment jury trial rights.” But Outlaw failed to identify or brief those alleged problems, therefore, we decline to address this argument. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating issues that are not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

The district court did not act inconsistently with our instructions, and therefore did not abuse its discretion on remand by admitting evidence of Outlaw’s additional felony convictions, which resolved the issue on remand of whether Outlaw had the requisite number of prior felony convictions for sentencing under the career-offender statute.

II. Appellant’s *Blakely* rights were not violated.

In the alternative, Outlaw argues that the district court violated his Sixth Amendment right to a jury trial by not reconvening a jury to make a finding of a pattern of criminal conduct based on the “new group” of prior felony convictions, including the Georgia and North Carolina convictions. Outlaw raises a constitutional issue. This court uses a de novo standard of review when interpreting the constitution. *State v. Shattuck*, 704 N.W.2d 131, 135 (Minn. 2005).

In *Apprendi v. New Jersey*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.” 530 U.S. 466, 490, 120 S. Ct. 2348, 2362–63 (2000). Applying *Apprendi*, in *Blakely v. Washington*, the Supreme Court held that an upward durational departure from the statutory-maximum sentence based on findings made by a judge, rather than a jury, is invalid under the Sixth Amendment right to a trial by jury. 542 U.S. 296, 301–05, 124 S. Ct. 2531, 2536–38 (2004).

Minn. Stat. § 609.1095, subd. 4 (2008), authorizes a judge to “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.”

Here, a sentencing jury found that Outlaw committed the crime for which he was being sentenced (burglary) as part of a pattern of criminal conduct. We affirmed the jury’s finding of a pattern of criminal conduct in Outlaw’s first appeal, and there was no issue regarding the pattern to be determined on remand. *Outlaw*, 748 N.W.2d at 357, 360.

Outlaw’s argument that “[t]he introduction on remand of the two additional prior convictions changes the evidence of the underlying pattern of criminal conduct because it changes the comparison of applicable ‘felony convictions,’” is based on his erroneous assumption that only his *felony* convictions can be considered to support a pattern of criminal conduct under the career-offender statute. But there is no requirement that a pattern of criminal conduct be based solely on felony convictions. *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996) (interpreting the meaning of the phrase “pattern of criminal conduct” as used in Minn. Stat. § 609.1095, subd. 4, and concluding that “[n]othing in the statute limits the sentencing court’s consideration to prior felony convictions, nor even to convictions at all”). Even if some of Outlaw’s prior convictions were not felonies, the seven prior burglaries and one attempted burglary established, as noted in our earlier opinion, a pattern of criminal conduct. *Outlaw*, 748 N.W.2d at 357. Therefore, the two additional felony convictions introduced on remand do not affect our prior decision that the evidence at the first sentencing hearing established a pattern of criminal conduct, and

the district court did not violate Outlaw's *Blakely* rights by declining to convene another sentencing jury on the issue of pattern of criminal conduct.

III. The jury's finding of a pattern of criminal conduct is valid.

Outlaw argues for the first time in this appeal that the sentencing jury's finding of a pattern of criminal conduct was invalid due to "the [s]tate's reference at the sentencing trial to five of [a]ppellant's foreign convictions as 'burglaries,' when it failed to prove that [these convictions] constitute burglaries under Minnesota law" Outlaw does not present any authority for the proposition that to establish a pattern of criminal conduct, the state must prove that every prior burglary conviction constituted burglary as defined in Minnesota. Outlaw does not dispute that he has been convicted of a number of crimes that are considered burglaries in the state of conviction. The exhibits supporting the convictions described the conduct underlying the convictions and established a pattern of entering vehicles and buildings without consent and with the intent to commit theft. Even if some of these crimes would have been labeled differently in Minnesota, the state only had to prove a pattern of criminal conduct, not a pattern of committing crimes that fit a specific definition of a particular crime in Minnesota. The record fully supports the jury's finding of a pattern of criminal conduct.

IV. Outlaw's criminal history score is not relevant to his sentence in this case.

Outlaw argues that the district court erred by failing to recalculate his criminal history score on remand. Outlaw's criminal history score of nine, calculated at the time of the original sentencing hearing, was based, in part, on counting six of the challenged foreign convictions as felonies, resulting in a presumptive sentence of 108 months, with a

range of 92 to 129 months. Minn. Sent. Guidelines IV (2005). On remand, the district court did not recalculate Outlaw's criminal history score. Outlaw argues that his criminal history score can only be based on the four felony convictions³ admitted at the first sentencing hearing and that his sentence should be reversed and remanded because the sentencing judge may not have appreciated the severity of the departure when it sentenced him under the career-offender statute, which does not rely on a defendant's criminal history score.

In *State v. Evans*, the supreme court articulated the general—but not absolute—rule that when a durational departure is justified by compelling factors, the upper departure limit is double the maximum presumptive sentence length. 311 N.W.2d 481, 483 (Minn. 1981). The court limited its holding with the following: “we cannot state that this is an absolute upper limit on the scope of departure because there may well be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified.” It is this general rule on which Outlaw appears to rely.

But the career-offender statute specifically authorizes the court to impose a durational departure up to the statutory maximum. Therefore, the district court was authorized to impose the statutory maximum sentence of twenty years even if it was a greater-than-double departure from his presumptive sentence. *See Neal v. State*, 658 N.W.2d 536, 544 (Minn. 2003) (rejecting Neal's argument that in sentencing under the

³ We note that the record does not support Outlaw's assertion that his criminal history score is four.

dangerous-offender statute,⁴ *Evans* requires that a more-than-double durational departure from the sentencing guidelines be justified by severe aggravating factors). The district court did not err or abuse its discretion by declining to recalculate Outlaw's criminal history score because his criminal history score is irrelevant to sentencing under the career-offender statute.

Affirmed.

⁴ “The dangerous-offender statute authorizes a district court to impose an upward durational departure from the presumptive sentence up to the statutory maximum if the offender is at least 18 years old and the court determines that the offender (1) committed a violent crime that is a felony; (2) has two or more prior convictions for violent crimes; and (3) is a danger to public safety. Minn. Stat. § 609.1095, subd. 2.” *Id.* at 543.