STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0801

State of Minnesota,
Respondent,

vs.

Andrew Wayne Clarke,
Appellant.

Filed May 12, 2014
Affirmed
Chutich, Judge

St. Louis County District Court
File No. 69DU-CR-12-3177

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

Mark S. Rubin, St. Louis County Attorney, Kristen E. Swanson, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, Michael N. Leonard, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant Andrew Wayne Clarke appeals from the career-offender sentence imposed for convictions of second-degree sale and third-degree possession of a controlled substance. He contends that sufficient evidence does not support a finding of a pattern of criminal conduct, the district court abused its sentencing discretion, and the state improperly argued that the current convictions were motivated by Clarke's drug habit. In his pro se supplemental brief, Clarke asserts that an unconstitutional search occurred when he was arrested and that he should have been allowed to confront certain witnesses. Because sufficient evidence supports the jury's finding of a pattern of criminal conduct, the district court sentenced Clarke within its discretion, the state did not commit prosecutorial misconduct, and Clarke's pro se arguments are without merit, we affirm.

FACTS

In September 2012, police received information that Clarke, who had an active warrant for his arrest, would be arriving on a shuttle bus at a hotel in Duluth. Upon Clarke's arrival, the police arrested and searched him. Officers found baggies in Clarke's pants pockets containing a substance that they believed to be heroin. Testing confirmed that the substance was heroin.

The state ultimately charged Clarke with one count of second-degree sale of a controlled substance and one count of third-degree possession of a controlled substance.

See Minn. Stat. §§ 152.022, subd. 1(1), .023, subd. 2(a)(1) (2012). A jury convicted Clarke of both charges.

Immediately after the guilty verdicts, the jury took part in the sentencing phase of the trial, during which Daniel Bartlett of Arrowhead Regional Corrections testified for the state. Bartlett testified that he has worked at Arrowhead for 25 years and that he was Clarke's probation officer for approximately two months.

During Bartlett's testimony, the district court received into evidence a list of Clarke's 13 prior felony convictions. The district court also received into evidence a list of the dates and locations that Clarke has been previously incarcerated in prison and local jails and certified copies of some of the felony convictions.

The state asked Bartlett whether, based on his training and experience, he had "an opinion as to the existence of any relationship between folks who are convicted of controlled substance crimes and other types of crimes that may be committed." Bartlett responded, "Yes." The state then asked, "In your experience is there a connection between theft crimes and folks who you have supervised who have drug convictions?" Bartlett responded, "Yes, there is." He stated that "[i]t is quite common for folks that are on probation or parole for drug offenses to have committed, what we call, property crimes: burglaries, thefts, of those nature, to fund their drug and alcohol use." Bartlett also responded "Yes" to the state's question, "Would this relationship occur also in cases where the individuals were selling those controlled substances, not just using them?"

The jury was asked to respond to three questions on the special-verdict form: (1) "Does Mr. Clarke have five or more prior felony convictions, not including the

present offense?"; (2) "Is the present offense a felony?"; and (3) "Were the present offenses committed as part of a pattern of criminal conduct?" The jury responded "Yes" to all three questions.

On the second-degree controlled-substance conviction, the district court sentenced Clarke to 258 months in prison, double the top of the presumptive sentencing range of 129 months. Clarke appeals.

D E C I S I O N

I. Pattern of Criminal Conduct

Clarke asserts that the evidence at the sentencing hearing is insufficient to support a finding that his past convictions were related to his current controlled-substance convictions. For the reasons set forth below, we disagree.

When reviewing a sufficiency-of-the-evidence claim, "we are limited to determining whether the evidence was sufficient to support the conclusion reached by the jury." *State v. Outlaw*, 748 N.W.2d 349, 357 (Minn. App. 2008) (reviewing appellant's claim that the evidence was insufficient to show a pattern of criminal conduct under the career-offender statute), *review denied* (Minn. July 15, 2008). We view the record in the light most favorable to the jury's conclusion. *Id.*

District courts may impose an aggravated durational departure up to the statutory maximum sentence if the factfinder determines (1) "that the offender has five or more prior felony convictions" and (2) "that the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4 (2012). The determination of a pattern of criminal conduct is a finding that must be submitted to a

jury and proven beyond a reasonable doubt, unless waived by the defendant. *See Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011); *State v. Henderson*, 706 N.W.2d 758, 762 (Minn. 2005).

A "pattern of criminal conduct" under the career-offender statute "may be demonstrated by 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 finding of a pattern of criminal conduct "involves a comparison of different criminal acts, weighing the degree to which those acts are sufficiently similar." *Henderson*, 706 N.W.2d at 762 (quotation omitted). "This determination goes beyond a mere determination as to the fact, or number, of the offender's prior convictions." *Id.*

Here, the evidence was sufficient for the jury to determine that the present offense—a controlled-substance conviction—was committed as part of a pattern of criminal conduct. The state introduced evidence of Clarke's 13 prior felony convictions and the testimony of the probation officer. Clarke's 13 prior felony convictions are: (1) passing counterfeit currency; (2) aggravated forgery; (3) burglary; (4) second-degree burglary; (5) offering a forged check; (6) first-degree possession of crack cocaine; (7) fifth-degree possession of a controlled substance; (8) fourth-degree assault on a corrections employee; (9) fifth-degree possession of a controlled substance; (10) felony identity theft; (11) fifth-degree possession of a controlled substance; (12) felony theft; and (13) felony theft. The district court's instructions to the jury during the sentencing

trial properly reflected the *Gorman* definition of pattern of criminal conduct. *See Gorman*, 546 N.W.2d at 9.

Four of Clarke's prior felony convictions are drug offenses, which share sufficiently similar purposes (obtain controlled substances) and results (use or sell controlled substances) with the current offense to establish a "pattern of criminal conduct" under *Gorman*. *See id.* Importantly, the career-offender statute does not require the pattern finding to be based on a certain number of prior convictions. *See* Minn. Stat. § 609.1095, subd. 4. The jury could have reasonably concluded that Clarke's four prior drug convictions share similar characteristics with his current controlled-substance conviction. *See Outlaw*, 748 N.W.2d at 357.

We recognize that we held in *State v. McClenton* that certain convictions of McClenton's were inadmissible to prove a pattern of criminal conduct because "[w]ithout a factual basis concerning these convictions, the use of these offenses amounted to attempted proof by the fact of conviction alone." 781 N.W.2d 181, 194 (Minn. App. 2010). But here, where the current offense for which Clarke was sentenced is a drug offense and Clarke has four prior drug convictions, the nature of drug offenses is sufficient to show a pattern—"[a] series of acts that are recognizably consistent"—of criminal conduct. *Black's Law Dictionary* 1242 (9th ed. 2009). Moreover, the jury could have believed the probation officer's testimony that people who have committed drug offenses commit property crimes "to fund their drug and alcohol use." Clarke has four prior felony convictions involving theft or burglary and eight felony convictions that include the financial crimes of forgery and identity theft.

II. Sentencing Discretion

Clarke next contends that the district court abused its discretion by sentencing him based on facts not found by the jury and by failing to sufficiently explain the reasons for the departure. "We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *Vickla*, 793 N.W.2d at 269 (reviewing sentence under career-offender statute); *see also State v. Munger*, 597 N.W.2d 570, 574 (Minn. App. 1999) (reviewing district court's decision to depart under the career-offender statute), *review denied* (Minn. Aug. 25, 1999). We will affirm if the district court's reasons for departing are "legally permissible and factually supported in the record." *Vickla*, 793 N.W.2d at 269 (quotation omitted).

On appeal, we "may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11 (2012). Under the career-offender statute, district courts "may impose a greater-than-double-durational departure without finding severe aggravating factors." *Vickla*, 793 N.W.2d at 271.

Here, the district court properly sentenced Clarke within its broad discretion. The presumptive sentence for a second-degree controlled substance crime is 108 months for a criminal history score of 6 or more. Minn. Sent. Guidelines 4.A (2012). Because of the jury's findings that Clarke had five or more prior felony convictions and his present offense was committed as part of a pattern of criminal conduct, the district court had the discretion to sentence Clarke up to the statutory maximum for second-degree sale of a

controlled substance, which is 40 years for a subsequent controlled-substance conviction. Minn. Stat. §§ 609.1095, subd. 4, 152.022, subd. 3(b). Clarke's sentence of 258 months is equal to 21.5 years, about one-half of the statutory maximum.

In sentencing Clarke, the district court stated that the basis for its decision to sentence him to 258 months—double the top-of-the-box presumptive sentence—was because of the jury's findings under the career-offender statute. While Clarke's prior drug convictions are for possession and not sale, the district court's statement that Clarke is "someone who [has made] a career . . . out of dealing drugs" is not reversible error. The district court took into consideration Clarke's lengthy criminal history, the presentence investigation, and the parties' arguments in making its decision. *See Vickla*, 793 N.W.2d at 271 ("[The career-offender statute] allows the court to consider a defendant's entire criminal history to determine . . . the length of the sentence that will be imposed."). Contrary to Clarke's assertion, the district court provided sufficient reasoning for its decision to depart, which is factually supported in the record.

III. Prosecutorial Misconduct

Clarke claims that the prosecutor committed misconduct when, during closing argument in the sentencing trial, she "suggested that the jury could find a pattern of criminal conduct that was motivated by Mr. Clarke's purported drug addiction" without introducing evidence that showed that Clarke was a drug user at the time of his arrest or evidence concerning the circumstances of his prior convictions. Clarke did not object to the state's closing argument.

We review unobjected-to alleged prosecutorial misconduct under a modified plain-error test. *State v. Nissalke*, 801 N.W.2d 82, 103 (Minn. 2011). The defendant must show that (1) an error occurred and (2) that the error was plain. *Id.* "An error is plain if it is clear or obvious." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). If the defendant makes this showing, the burden then shifts to the state "to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "A defendant's substantial rights are affected if there is a reasonable likelihood that the error actually impacted the verdict." *Nissalke*, 801 N.W.2d at 104 (quotation omitted).

A prosecutor has the "right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980). But the prosecutor "may not speculate without a factual basis." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009).

The prosecutor did not commit misconduct during her closing argument at the sentencing trial. The prosecutor did not mention a drug habit or addiction that Clarke allegedly has, and the record shows that she did not make any speculative statements. The prosecutor referred to the three special-verdict questions and argued that the jury should find a pattern of criminal conduct based on the probation officer's testimony and the exhibits admitted into evidence. She properly presented inferences to be drawn from Clarke's prior convictions—that his prior convictions show a pattern of criminal conduct.

IV. Pro Se Argument

In his pro se supplemental brief, Clarke argues that the search that occurred when he was arrested violated the Fourth Amendment. Specifically, he claims that the police "had no reason to look inside [his] pants" and that the manner in which the search was conducted was "constitutionally unreasonable." Clarke also asserts that the district court abused its discretion "by not allowing [him] to confront the witnesses at the *Rasmussen* hearing."

"In general, searches conducted without a search warrant are 'per se unreasonable.'" *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001) (quoting *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999)). "The state bears the burden of establishing an exception to the warrant requirement." *Id.* During a search incident to arrest, the police may conduct a warrantless search of the arrestee's person and the area within the person's immediate control. *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040 (1969). The purposes of the search-incident-to-arrest exception are to protect officers and to "safeguard[] any evidence of the offense of arrest that an arrestee might conceal or destroy." *Arizona v. Gant*, 556 U.S. 332, 339, 129 S. Ct. 1710, 1716 (2009).

After a thorough review of the record, we conclude that Clarke's pro se arguments are without merit. The state met its burden of showing the constitutionality of the police's actions. *See Ture*, 632 N.W.2d at 627. Clarke does not argue that his arrest was unlawful, and he does not contest the officers' search of his pants pocket where the heroin was found. The record shows that no "cavity" search took place and that the scope of the officers' search was reasonable under the circumstances. *See State v.*

Rodewald, 376 N.W.2d 416, 420 (Minn. 1985) (stating that "a search incident to the arrest requires no additional justification" (quoting *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477 (1973))).

Affirmed.