STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0384

State of Minnesota,
Respondent,

vs.

Robert A. Shattuck,
Appellant.

Filed June 9, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. CR-01-011914

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55105 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

KALITOWSKI, Judge

Appellant Robert A. Shattuck challenges his 86-month sentence for his kidnapping conviction, arguing that: (1) the law-of-the-case doctrine precluded the district court from resentencing appellant on his kidnapping conviction; (2) imposing an 86-month consecutive sentence was a departure that required a jury's fact-findings and the consecutive kidnapping sentence unfairly exaggerates the criminality of his conduct; (3) the "prior conviction exception" to the *Blakely* rule is of doubtful continued validity and therefore, the district court's use of appellant's prior conviction to depart from the presumptive sentence violated his Sixth and Fourteenth Amendment rights; (4) the district court erred by instructing the jury that their votes on the verdict forms had to be unanimous; and (5) the resentencing court erred in deciding not to impanel a sentencing jury. We affirm.

D E C I S I O N

The charges and convictions in this case stem from a 2001 kidnapping and sexual assault of a minor, the facts of which are detailed in *State v. Shattuck*, 704 N.W.2d 131, 134 (Minn. 2005) (*Shattuck II*).

A jury found appellant guilty of two counts of kidnapping, two counts of first-degree criminal sexual conduct, and one count of first-degree aggravated robbery. The district court sentenced appellant to the presumptive term of 161 months' imprisonment on count one, kidnapping (facilitation of felony), and also imposed an enhanced 360-month (30-year) sentence for count three, first-degree criminal sexual conduct (use of

weapon), based on its findings of four aggravated factors. The district court ordered that the sentences be served concurrently.

On direct appeal, appellant challenged, among other things, the legality of his sentence, arguing that the aggravating factors used to justify the enhanced sentence needed to be decided by a jury under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). *State v. Shattuck*, No. C6-03-362, 2004 WL 772220, at *6-7 (Minn. App. Apr. 13, 2004) (*Shattuck I*), *rev'd*, *Shattuck II*, 704 N.W.2d 131. We affirmed appellant's convictions and sentence, but remanded for recalculation of jail credit. *Shattuck I*, 2004 WL 772220, at *1-7. While appellant's petition for review was pending before the Minnesota Supreme Court, the United States Supreme Court issued its decision in *Blakely*. Based on *Blakely*, the Minnesota Supreme Court reversed appellant's criminal-sexual-conduct sentence and remanded the case for resentencing consistent with its opinion. *Shattuck II*, 704 N.W.2d at 148.

On remand for resentencing, the district court ruled that appellant was not entitled to a sentencing jury and imposed an aggravated 274-month prison sentence for appellant's criminal-sexual-conduct conviction based upon appellant's 1993 criminal-sexual-conduct conviction and Minn. Sent. Guidelines II.D.2.b.(3). The district court also imposed a consecutive 86-month sentence for appellant's kidnapping conviction, resulting in an aggregate sentence of 360 months.

I.

Appellant argues that the law-of-the-case doctrine precluded the district court from resentencing him on his kidnapping conviction, and that by changing the 161-month

concurrent kidnapping sentence originally imposed to an 86-month consecutive sentence, the district court exceeded the scope of the supreme court's remand. We disagree.

Law of the Case

Law of the case is a discretionary doctrine developed to effectuate finality of appellate decisions, and it ordinarily applies where an appellate court has ruled on an issue and remanded; it is not normally applied by a district court to its own prior decisions. *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994). Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case.*" *Kornberg v. Kornberg*, 525 N.W.2d 14, 18 (Minn. App. 1994) (quotation omitted), *aff'd*, 542 N.W.2d 379 (Minn. 1996); *see also State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007) (applying law-of-the-case doctrine in a criminal case).

The Minnesota Supreme Court specifically chose to "remand *this case* to the district court for resentencing consistent with this opinion." *Shattuck II*, 704 N.W.2d at 148 (emphasis added). The supreme court did not state that it was remanding the case solely for resentencing on appellant's criminal-sexual-conduct conviction. Nor did the supreme court direct the district court to refrain from resentencing on appellant's kidnapping conviction. If the supreme court intended to remand only the sentence for the criminal-sexual-conduct conviction, the court would have so stated. Instead, the supreme court remanded the entire "case" and did not direct the district court to proceed in any particular fashion, except generally in a manner "consistent with this opinion." *Id.*

Thus, we reject appellant's argument that his 161-month concurrent sentence for kidnapping was the law of the case.

Scope of Remand

Appellant argues that the district court exceeded the scope of remand when it resentenced appellant on his kidnapping conviction. We disagree.

A district court "may not vary the mandate of an appellate court or decide issues beyond those remanded." *Harry N. Ray, Ltd. v. First Nat'l Bank of Pine City*, 410 N.W.2d 850, 856 (Minn. App. 1987). Here, the supreme court remanded the "case to the district court for resentencing consistent with [its] opinion." *Shattuck II*, 704 N.W.2d at 148. And the primary mandate of the *Shattuck II* opinion was that appellant had a right to have a jury, rather than a judge, determine aggravating factors using a reasonable doubt standard. *Id.* at 141-42.

Because the supreme court's opinion did not direct the district court to proceed with resentencing in any particular fashion except generally in a manner consistent with its opinion, we conclude that the district court was permitted to reconsider the sentences on both appellant's criminal sexual conduct and kidnapping convictions.

II.

Appellant argues that under *Blakely* he was entitled to a jury trial on the issue of whether the kidnapping offense was incidental to the criminal-sexual-conduct offense because this consecutive sentence "constitutes a departure." Appellant also argues that his sentence exaggerates the criminality of his conduct. We disagree.

This court reviews consecutive sentencing under an abuse-of-discretion standard. *State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003). "A trial court's decision regarding permissive, consecutive sentences will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant's conduct." *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998).

Right to Jury Trial

Under Minn. Sent. Guidelines II.F. (2000), multiple current felony convictions for crimes against persons may be sentenced consecutively to each other. Both kidnapping and first-degree criminal sexual conduct are by nature "crimes against a person," for which a district court may impose consecutive sentences under the guidelines. *See* Minn. Stat. § 609.25 (defining the acts that constitute kidnapping); Minn. Stat. § 609.342 (defining first-degree criminal sexual assault); Minn. Sent. Guidelines II.F. (stating that multiple current felony convictions for crimes against persons may be sentenced consecutively to each other).

Blakely does not apply to a district court's determination of whether a conviction involves a "crime against persons" for purposes of permissive consecutive sentencing. *State v. Senske*, 692 N.W.2d 743, 748-49 (Minn. App. 2005). Recently, the United States Supreme Court concluded that the Sixth Amendment does not prevent states from assigning to judges, rather than to juries, the duty to find the facts necessary to impose consecutive, rather than concurrent, sentences for multiple offenses. *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009).

We conclude that because *Blakely* does not apply to permissive consecutive sentencing, the district court did not err in sentencing appellant to consecutive sentences.

Exaggerated Criminality

Appellant argues that the imposition of the 86-month consecutive sentence unfairly exaggerates the criminality of his conduct. We disagree.

The facts proven at trial show that appellant approached his victim after she got off of a bus, forced her to walk down an alley, and that after moving her down the alley, appellant sexually assaulted her and then punched her in the face, breaking her jaw. *Shattuck II*, 704 N.W.2d at 134. The resentencing court determined that the kidnapping was "a separate incident and appropriate for consecutive sentencing." Based on these facts, we conclude that appellant's removal and confinement of his victim was "criminally significant in the sense of being more than merely incidental to the underlying crime." *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003). Thus, we conclude that the permissive consecutive sentence for kidnapping does not unfairly exaggerate the criminality of appellant's conduct.

III.

Appellant argues that the prior conviction exception to the *Blakely* rule is of questionable validity and therefore, the district court's reliance on his prior conviction for third-degree criminal sexual conduct to depart from the presumptive sentence violated his Sixth and Fourteenth Amendment rights.

But the Minnesota Supreme Court has noted that "it appears that, after *Blakely*, the prior conviction exception recognized in *Apprendi* retains validity." *State v. Leake*, 699 N.W.2d 312, 323 (Minn. 2005).

The court of appeals is not the appropriate court to construe a provision of the Minnesota Constitution more expansively than the United States Supreme Court has construed the federal constitution. *State v. Berge*, 464 N.W.2d 595, 596-97 (Minn. App. 1991), *aff'd mem.*, 474 N.W.2d 828 (Minn. 1991). And it is not the province of this court to make a dramatic change in the interpretation of the Minnesota Constitution where the supreme court has not done so. *Minn. State Patrol Troopers Ass'n ex rel. Pince v. State, Dep't of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989), *review denied* (Minn. May 24, 1989). Thus, we reject appellant's invitation to examine the validity of the prior conviction exception to *Blakely*.

Because the prior conviction exception established by *Almendarez-Torres* is controlling law that has not been modified or overruled by either *Blakely* or *Apprendi*, we conclude that the district court did not violate appellant's Sixth and Fourteenth Amendment rights in relying on appellant's prior criminal-sexual-conduct conviction to depart from the presumptive sentence.

IV.

Appellant argues pro se that the district court erred by instructing the jury that their votes on the verdict forms had to be unanimous.

This court will generally not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Upon the supreme

court's remand for resentencing, appellant did not raise the argument regarding jury instructions that he now raises on appeal. Consequently, we will not consider this argument. Moreover, we note that this case was remanded solely for resentencing and therefore, the scope of remand did not permit appellant to raise new challenges to his convictions.

V.

Appellant also argues pro se that the district court erred in deciding not to impanel a sentencing jury after it initially stated in its September 5, 2006 memorandum of law that it would impanel a jury to determine aggravating factors. We disagree.

The district court indicated in its September 5, 2006 order and memorandum of law that it planned to exercise its authority to impanel a sentencing jury on remand. But the district court also noted that pursuant to Minn. Sent. Guidelines II.D.2(b)(3) and the prior criminal-sexual-conduct conviction exception, it was not required to impanel a sentencing jury because it had the authority to impose an enhanced sentence solely on the basis of appellant's prior conviction.

As previously discussed, the sentencing guidelines and the prior conviction exception to the *Blakely* rule permit the district court, rather than a jury, to find the fact of a prior conviction to justify an upward departure. We thus conclude that the district court did not err in declining to impanel a jury to find the fact of appellant's prior conviction.

Affirmed.