STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1735

State of Minnesota,
Respondent,

vs.

Robert Edgar Linky,
Appellant.

Filed August 31, 2010
Affirmed
Muehlberg, Judge[*]

St. Louis County District Court
File No. 69DU-CR-09-1350

Lori A. Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Melanie Ford, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Muehlberg, Judge.

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

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

MUEHLBERG, Judge

Appellant challenges the sentence imposed for his conviction of second-degree assault. He argues that the district court's imposition of the 36-month mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(a) (2008), without a jury finding that he used a firearm in the commission of the assault, violated his Sixth Amendment right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Although the 36-month sentence was imposed in violation of appellant's Sixth Amendment rights under *Blakely*, because the *Blakely* error was harmless beyond a reasonable doubt, we affirm.

FACTS

On January 25, 2009, appellant Robert Edgar Linky assaulted B.L. with a firearm. B.L. was in her friend W.C.'s apartment in Duluth. T.L., B.L.'s 13-year-old son and appellant's nephew, was also present. For the two months prior to the offense date, T.L. lived with appellant in Superior, Wisconsin. At the time, B.L. also lived in Superior. January 25 was a Sunday, and B.L. took T.L. to spend that weekend with W.C.

Around 2:00 p.m. on January 25, appellant and his 18-year-old son knocked on the door to W.C.'s apartment. B.L. answered the door, and appellant began yelling at her for not answering the phone earlier when he called. B.L. was afraid that appellant would hit her, so she walked into the room where she, T.L., and W.C. had been watching television. Swearing, and behaving in what B.L. described as a "ranting and raving" manner, appellant followed her. Appellant then took a handgun out from under his leather jacket.

He placed one hand on top of B.L.'s head. Appellant pointed the gun at B.L., placed the barrel under her chin, and asked her whether she wanted to die. W.C. ran out of the room and dialed 911. At that time, appellant left W.C.'s apartment and drove off in his white Ford F-150 pickup truck. During the 911 call, W.C. told all of this to the police.

Respondent State of Minnesota charged appellant with second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2008) and two counts of aggravated first-degree witness tampering in violation of Minn. Stat. § 609.498, subds. 1(b)(a)(4), (5) (2008). W.C., B.L., and T.L. all testified at trial that appellant angrily barged in, placed the gun under B.L.'s chin, and asked her if she wanted to die that day. After the incident, T.L. initially told the police the version that the state's witnesses testified to at trial. In a subsequent police interview, T.L. stated that he did not see a gun. T.L. testified that he changed his story because he was scared about his mother's welfare, and that she asked him to do so. B.L. also recanted at that interview, stating that no gun was involved. She testified that she recanted because she had received a threatening phone call. Those and other alleged threats formed the basis of the witness-tampering charges, of which appellant was acquitted. W.C. never recanted and maintained, from the time she dialed 911, that appellant had threatened B.L. with a firearm.

Appellant waived his constitutional right to testify in his own behalf. One defense witness, B.B., testified at trial. B.B., a 17-year-old girl, had previously dated appellant's son. B.B. testified that appellant had spent the whole day with her and her family in Superior, and that appellant could not have been at W.C.'s apartment in Duluth at the

time alleged. In contrast, T.L. and B.L. both testified that they saw B.B. in the truck with appellant outside W.C.'s apartment.

No evidence presented at trial related to any dangerous weapon other than a firearm. The defense theory was alibi, and that appellant was never at W.C.'s apartment that day. In closing argument, defense counsel asserted that the case came down to one fact: "either [appellant] was there or he wasn't." Defense counsel continued, "My theory of the case is he wasn't there, so gun issues don't apply to me."

In the state's closing argument, the prosecutor told the jury that the assault in the case "involve[d] the act of putting a firearm under [B.L.'s] throat." The prosecutor later reiterated this point: "The bottom line is, did we prove the case to you beyond a reasonable doubt that he had and used a firearm and he tampered with the witnesses?"

The jury found appellant guilty of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1, and not guilty of both counts of witness tampering. Relevant to this appeal, the jury was instructed that in order to find appellant guilty of second-degree assault, it had to find that appellant "used a dangerous weapon" when he assaulted B.L. *See* 10 *Minnesota Practice*, CRIMJIG 13.10 (2006). The jury was instructed that a firearm is a dangerous weapon, but it was not instructed to find that appellant used a firearm in the assault or that only a firearm is a dangerous weapon. The district court instructed the jury to apply the law as stated by the court.

After the jury found appellant guilty of second-degree assault, a sentencing hearing was held. Defense counsel stated that "anything other than 36 months would be a departure," and that no substantial and compelling reasons existed to justify a departure.

The district court imposed a 36-month sentence, stating that this was the guidelines sentence. Appellant did not object at the time or make the *Blakely* argument that is now presented on appeal. However, the right to a jury trial is not subject to forfeiture, that is, waiver by silence. *State v. Osborne*, 715 N.W.2d 436, 443 (Minn. 2006). Accordingly, consideration on direct appeal of any *Blakely* error was not forfeited by appellant. *See id.* at 446. This appeal follows.

D E C I S I O N

This case involves a question of constitutional law, which we review de novo. *State v. Shattuck*, 704 N.W.2d 131, 135 (Minn. 2005). The right to trial by jury guaranteed by the Sixth Amendment of the United States Constitution mandates that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). The constitutional question is whether the sentence imposed could have been imposed under state law without the challenged factual finding: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537.

In support of his claim of *Blakely* error, appellant cites this court's unpublished decision in *State v. Wood*, No. A05-557, 2007 WL 1053003 (Minn. App. Apr. 3, 2007), which involves operative facts nearly identical to those in the instant case. The *Wood* court held that the jury's findings that the defendant (1) was an ineligible person in

possession of a firearm; and (2) assaulted the victim with a dangerous weapon did not amount to a finding that the defendant used the firearm in the assault:

> [T]he jury did not specifically determine that Wood possessed a firearm when he committed the assaults. Rather, the jury found Wood guilty of count one, possession of a firearm by an ineligible person, and also guilty of counts two through four, second-degree assaults with a dangerous weapon. Although the jury instructions for the assault counts state that a firearm is a dangerous weapon, it is logically possible that another dangerous weapon could have been used to commit the assaults. Thus, the jury's verdict does not conclusively establish that it found that Wood possessed or used a firearm in committing the assaults.

2007 WL 1053003, at *5. That case involved undisputed evidence that shots were fired and "no evidence that any weapon other than a firearm was used to commit the assaults," but the court still held that failure to submit the aggravating factor of using a firearm during the assaults was a *Blakely* error. *Id.* at *6.

Respondent correctly observes that this court's unpublished opinions are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2008). However, we believe that the *Wood* court correctly decided this issue.[1] In *Washington v. Recuenco*, the Supreme Court considered a case in which (1) the defendant threatened his wife with a handgun; (2) the defendant was charged with assault with a handgun; and (3) the jury convicted the defendant of assault with a deadly weapon. 548 U.S. 212, 215, 126 S. Ct. 2546, 2549 (2006). The Court held that a sentence based on a mandatory enhancement because the defendant was armed with a firearm, when there was no special verdict answer indicating

[1] *Wood* was abrogated on other grounds by *State v. Williams*, 757 N.W.2d 504, 511 (Minn. App. 2008), *review granted* (Minn. Jan. 20, 2009).

that the assault occurred with a firearm rather than some other deadly weapon, was a Sixth Amendment violation under *Blakely*. *Id.*

The instant case is on all fours with *Wood* and *Recuenco*. Although the evidence submitted at trial pertained to an assault with a firearm, the jury only convicted appellant of assault with a dangerous weapon. For a defendant with appellant's criminal-history score, a conviction of second-degree assault with a dangerous weapon other than a firearm carries a 33-month sentence.[2] Appellant received a 36-month sentence, which is authorized if the assault was committed with a dangerous weapon *and that dangerous weapon was a firearm*. Minn. Stat. § 609.11, subd. 5(a). Thus, the district court's failure to submit to the jury the question of whether appellant committed the assault with a firearm, rather than some other dangerous weapon, coupled with the enhanced sentence based on the statutory enhancement of using a firearm during the assault, amounts to a Sixth Amendment violation.

However, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Recuenco*, 548 U.S. at 222, 126 S. Ct. at 2553. *Blakely* error is therefore subject to harmless-error analysis. *Id.* at 221, 126 S. Ct.

[2] *Blakely* prohibits an upward durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines in the absence of additional findings by the jury. *Shattuck*, 704 N.W.2d at 141. Minn. Stat. § 609.11, subd. 4 imposes a mandatory minimum prison sentence of one year and one day for second-degree assault committed with a dangerous weapon other than a firearm. But when a statute mandates a prison sentence of more than one year, the presumptive disposition is commitment to the commissioner of corrections, and the presumptive duration of the sentence is the longer of (1) the statutory mandatory minimum and (2) the prison sentence provided in the sentencing guidelines grid. Minn. Sent. Guidelines II.E (2008). With appellant's criminal-history score of 2, the presumptive sentence provided by the sentencing guidelines grid is a 33-month prison sentence. Minn. Sent. Guidelines IV, V (2008).

at 2253. The harmless-constitutional-error test places the burden on the state to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," that is, that there is no "reasonable possibility that the [federal constitutional error] complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 827-28 (1967) (quotation omitted).

In cases involving Sixth Amendment violations based on omission of an element of the offense from the jury instructions, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999). The reviewing court must "conduct a thorough examination of the record," and if, after that examination, the omitted element is "incontrovertibly establishe[d]" and the record does not "contain[] evidence that could rationally lead to a contrary finding with respect to the omitted element," then the error is harmless beyond a reasonable doubt. *Id.* at 16, 19, 119 S. Ct. at 1837-39. Our supreme court has applied the rule that a *Blakely* error is harmless beyond a reasonable doubt if the reviewing court can "say with certainty that a jury would have found the aggravating factors used to enhance [the defendant's] sentence had those factors been submitted to a jury in compliance with *Blakely*." *State v. Dettman*, 719 N.W.2d 644, 655 (Minn. 2006).

In this case, two conflicting versions of the facts were told at trial. Appellant's version was that he was in Wisconsin, did not go to W.C.'s apartment, and did not assault B.L. The state's version was that appellant went to W.C.'s apartment, where he yelled at

B.L., stuck a gun under her chin, and asked her whether she wanted to die. The jury found that the state had proven beyond a reasonable doubt that appellant assaulted B.L. with a dangerous weapon. Most crucially, no evidence was presented and no suggestion was ever made that any weapon other than a handgun was used in appellant's commission of the assault. No evidence in the record could have rationally led the jury, which found appellant guilty of second-degree assault, to make a contrary finding with respect to the omitted element—that is, that appellant did not use a firearm in the assault. If the jury had been properly instructed, it certainly would have found that the dangerous weapon appellant used in the assault was a firearm. Accordingly, the *Blakely* error was harmless beyond a reasonable doubt.

Affirmed.