STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2152

State of Minnesota,
Respondent,

vs.

Roy Allan Foss,
Appellant.

Filed October 19, 2010
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-09-9239

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Roy Allen Foss, Faribault, Minnesota (pro se appellant)

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

HALBROOKS, Judge

Appellant challenges his convictions of two counts of second-degree assault, arguing that he is entitled to a new trial because he did not validly waive his right to

counsel and that his convictions must be reversed because the district court erred by failing to inquire into his competency throughout the proceedings. Appellant further contends that his sentences are unlawful because they are based on a fact that was not found by the jury beyond a reasonable doubt and asserts additional arguments in his pro se brief. We affirm.

FACTS

On the evening of February 22, 2009, J.T. and J.K. were talking in a hallway outside of appellant's apartment. Appellant Roy Allan Foss opened his apartment door and confronted the two men, pushing J.K. and asking both victims if they wanted to get shot. J.T. ran into his apartment and yelled for his wife to call the police. When the officers arrived, appellant was taken into custody. After obtaining a search warrant, the officers discovered a .22 caliber handgun inside appellant's apartment. In a post-*Miranda* statement, appellant admitted that he took the revolver from his apartment to confront the victims and that he pointed the handgun at the victims. At his first appearance before the district court on February 25, 2009, appellant was appointed a public defender.

On August 6, 2009, appellant appeared in district court, and both he and his counsel informed the district court that appellant wished to discharge his counsel and proceed pro se. Appellant stated, "There's no question about—I want to represent myself. I'm not afraid to talk and I don't feel guilty." The district court asked appellant's counsel to review with appellant a standard petition to proceed pro se and to return for an additional hearing at a later date. Appellant asked the district court for

access to audio discovery and to do legal research at the jail, and the district court informed appellant that the jail would not alter its policies for those who opted to represent themselves and that the courts could not order them to do so. After this explanation, the district court again asked appellant whether he wanted to represent himself, and appellant indicated that he did.

The petition required appellant to list the crimes that he had been charged with and the applicable maximum statutory penalties. The petition also detailed the right to counsel, the right to a probable-cause and a pretrial hearing, the right to trial, the right to subpoena witnesses, and other consequences of proceeding pro se. Appellant signed each page of the petition. On August 24, 2009, the district court held a second hearing on appellant's request to represent himself. Appellant told the district court that he had no questions regarding the waiver-of-counsel form and stated that he still wished to represent himself. In response to the district court's question whether appellant wanted advisory counsel to be appointed, appellant stated that he wanted to go "solo." The district court then accepted appellant's petition to proceed pro se at trial.

During subsequent proceedings, appellant exhibited some curious behavior. Before jury selection, appellant asked to sing a short song for the district court. During jury selection, appellant stated, "You're getting paid," as the jurors left the courtroom. He asked only two questions of potential jurors, inquiring as to one juror's thoughts on "the pursuit of happiness" and higher education. Appellant also insisted on wearing his jail uniform during the proceedings because his street clothes were not clean. During his opening statement, appellant discussed the alleged assault, stating that J.K. and J.T. were

deliberately talking loudly in the hallway. Appellant also discussed his past ownership of firearms and stated that he owned firearms to protect himself.

Appellant cross-examined each of the state's witnesses. At first, appellant had difficulty posing questions to witnesses. He often attempted to tell his side of the story and argued with witnesses when they disagreed with his version of the events. But by the second day of trial, appellant was able to challenge the accuracy of photographs introduced through the police officers and asked a series of questions directed at the credibility of the police officers. For example, appellant asked if the officers were trained in courtroom testimony, whether they believed in right and wrong, and whether they believed it was always wrong to lie or whether lying could be acceptable in some instances.

Appellant elected to testify on his own behalf. He began his testimony by admitting that he drew a loaded gun on the victims that evening. He then stated, "I broke the law, okay." But appellant also testified that he did not know that his actions were against the law and, had he known that, he "wouldn't have done it." Before closing arguments, he informed the district court that he wanted to "preach" to the jury and wished to say, "I'm guilty according to your law. I also want to be able to tell them that they are the law and that law isn't the law." The district court told appellant that he could not make that argument. But during his closing argument, appellant stated:

> Today you are the law. You are the judge, not this building or him or droppings of the court. Was that what Paul Newman said in that movie when he won his Oscar? But you make the decision what you, you know, believe in your hearts to be right. Whatever it is, it's all right with me. I have

> nothing against you, okay. . . . Anything that happens to me in the future, don't worry about it. Whatever happens happens anyway.

The jury deliberated and found appellant guilty of both counts of second-degree assault.

Appellant represented himself at the sentencing hearing. The prosecutor requested that the district court impose consecutive presumptive sentences of 36 months on each count of second-degree assault. Appellant reiterated that had he known that it was against the law to threaten J.T. and J.K. with a firearm, he would not have done it. Before sentencing appellant, the district court stated that appellant was "somebody that under a lot of circumstances the Court would consider departure from the guidelines. But because you don't accept responsibility for your conduct, it seems to me you're a very high risk to reoffend." The district court sentenced appellant to two concurrent 36-month sentences. This appeal follows.[1]

D E C I S I O N

I.

Appellant argues that his waiver of the right to counsel was invalid because the district court did not conduct an intense, on-the-record inquiry before accepting his waiver. A defendant's waiver of his right to counsel must be knowing, voluntary, and intelligent. *State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007). In felony cases,

[1] A primary brief was filed on April 20, 2010, by the public defender's office. On May 14, 2010, appellant's counsel filed a request to withdraw as counsel on this appeal. We granted counsel's request and accepted appellant's pro se brief. We are required by rule to consider the arguments raised by the public defender even though appellant is no longer represented. *See* Minn. R. Crim. P. 28.02, subd. 5(17). We therefore consider the brief filed by the public defender in addition to the arguments raised in appellant's pro se brief.

a waiver must be in writing. Minn. Stat. § 611.19 (2008); Minn. R. Crim. P. 5.04, subd. 1(4); *State v. Jones*, 772 N.W.2d 496, 503 (Minn. 2009). Before accepting a waiver, the district court "should comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (quoting *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997)); *see also* Minn. R. Crim. P. 5.04, subd. 1(4). A district court's decision to accept a defendant's waiver will be reversed only if its findings that the waiver was knowing, voluntary, and intelligent are clearly erroneous. *Worthy*, 583 N.W.2d at 276.

Here, throughout the preliminary proceedings, appellant repeatedly expressed his desire to represent himself. When told by the district court that this was a big decision, appellant replied, "I made it a long time ago. There's no question about—I want to represent myself. I'm not afraid to talk and I don't feel guilty." In response to appellant's request to listen to audio discovery and access legal materials in jail, the district court advised appellant that he would have to follow the existing policies at the jail and would not be entitled to more access because he was representing himself.

After informing appellant of these limitations, the district court again inquired as to whether appellant wished to represent himself, and appellant replied that he had not changed his mind. At this hearing, the district court also detailed the role of stand-by counsel and informed appellant that, regardless of stand-by counsel, appellant would be on his own concerning "whether to object or what to say or how to respond to questions

from the Court, about whether you have anything to add on a particular argument or whether there's an objection to be made to certain exhibits, or what jury instructions to ask for."

Following this hearing, appellant reviewed and signed a four-page petition to proceed pro se. This petition included a recitation of appellant's charges, various trial rights, the role of advisory counsel, the range of possible sentences based on appellant's charges, and other consequences of proceeding pro se. The petition was offered and accepted at a hearing before the district court on August 24.

We conclude that appellant validly waived his right to counsel, despite the fact that the district court did not engage in an extensive on-the-record discussion. The district court highlighted on the record some of the risks of proceeding pro se, and others were included in the waiver form. Furthermore, the form that appellant completed includes his own notations regarding the crimes that he was charged with and the maximum sentences that he could receive for those crimes. The record reflects that appellant was made aware of the risks and consequences of proceeding pro se.

In addition, appellant was represented by counsel for approximately six months before he decided to discharge his attorney and proceed on his own, and "it may be presumed that [the defendant]'s attorney had advised him so that he could make an informed decision about representing himself." *State v. Thornblad*, 513 N.W.2d 260, 263 (Minn. App. 1994). Knowing all of this information, appellant continued to unequivocally request to represent himself. While a more in-depth on-the-record inquiry by the district court is preferable, the circumstances here indicate that appellant's waiver

was knowing, voluntary, and intelligent. We therefore conclude that the district court's decision to accept appellant's waiver of counsel was not clearly erroneous.

II.

Appellant asserts that the district court erred by failing to inquire into his competence before allowing him to waive his right to counsel. The level of competence required for a defendant to waive his right to counsel is judged by the same standard that is used to assess the level of competence required to stand trial. *Godinez v. Moran*, 509 U.S. 389, 397-98, 113 S. Ct. 2680, 2686 (1993); *see Thornblad*, 513 N.W.2d at 263 (concluding that *Godinez* overruled prior Minnesota case law that imposed a heightened level of competency for a defendant to waive his or her right to counsel, including *State v. Bauer*, 310 Minn. 103, 245 N.W.2d 848 (1976)).

Minn. R. Crim. P. 20.01, subd. 2, provides that a defendant is competent to stand trial unless the defendant lacks the ability to "rationally consult with counsel" or "understand the proceedings or participate in the defense due to mental illness or deficiency." *See Camacho*, 561 N.W.2d at 172 (stating that a substantially similar standard in a previous version of the rule "sufficiently measures competency to stand trial"). But rule 20.01 also includes a separate competency standard for a defendant waiving his right to counsel, stating that the defendant must be able to "(b) appreciate the consequences of proceeding without counsel; (c) comprehend the nature of the charges; (d) comprehend the nature of the proceedings; (e) comprehend the possible punishments; [and] (f) comprehend any other matters essential to understanding the case." Minn. R. Crim. P. 20.01, subd. 1.

Appellant argues that we should look to subdivision 1 when determining whether he was competent to waive his right to counsel. But substantially similar language was included in rule 20.01 at the time of the *Camacho* decision, and the supreme court held that the standard of competence required for a defendant to stand trial was to be the same as the standard for measuring whether a defendant was competent to waive his or her right to counsel. 561 N.W.2d at 171-72; *see also* Minn. R. Crim. P. 20.01, subd. 1 (1997). Therefore, contrary to appellant's argument, the proper standard to apply when considering whether appellant was competent to waive his right to counsel is whether he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and ha[d] a rational as well as factual understanding of the proceedings against him." *Camacho*, 561 N.W.2d at 171 (quotation omitted).[2]

"[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id.* at 172 (quoting *Godinez*, 509 U.S. at 399, 113 S. Ct. at 2687). Appellate courts review the validity of a waiver of a defendant's right to counsel to determine whether the

[2] Appellant also argues that *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), calls into question the continued validity of the *Godinez* decision. The specific issue in *Edwards* was whether "the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense." *Edwards*, 128 S. Ct. at 2385-86. We have previously addressed whether *Edwards* altered the holding articulated in *Godinez* and determined that *Edwards* was inapposite and "did not purport to overrule *Godinez* and specifically stated that the question before it was different from the issue addressed in *Godinez*." *State v. Briggs*, No. A08-0131, 2009 WL 1444026, at *3 (Minn. App. May 26, 2009), *review denied* (Minn. Aug. 11, 2009). Thus, there is no merit to appellant's argument that *Edwards* altered the standard articulated in *Godinez* and subsequent Minnesota case law.

district court was clearly erroneous in accepting the waiver. *See Jones*, 772 N.W.2d at 504.

Appellant argues in his primary brief that his digressions and apparent loss of focus during the preliminary hearings were "significant red flags" that called his competence into question. We disagree. While appellant was perhaps unfamiliar with the technicalities of the preliminary stages of trial, during the hearings he requested access to facilities at the jail that would enable him to listen to audio discovery and access to legal materials, which demonstrates a certain level of understanding regarding the proceedings. In addition, appellant was articulate and able to communicate his reasoning for proceeding pro se to the district court, and he was able to take direction from the district court and the public defender. Overall, the record reflects that appellant had a rational and factual understanding of the proceedings. Therefore, we conclude that the district court's decision to accept appellant's waiver was not clearly erroneous.

III.

Appellant contends that the district court erred by failing to inquire into his competency to proceed and to represent himself during the trial proceedings. "A defendant is denied the right to a fair trial under the Due Process Clause if the district court fails to observe adequate procedures to protect the defendant's right not to be tried or convicted while incompetent." *Camacho*, 561 N.W.2d at 174. Upon motion by either party, or on its own initiative, the district court must suspend criminal proceedings and order a medical examination or competency hearing if it determines that there is a reason to doubt the defendant's competence. Minn. R. Crim. P. 20.01, subds. 3-5. "Evidence of

the defendant's irrational behavior, demeanor at trial, and any prior medical opinion on competence to stand trial are relevant in determining whether there is reason to doubt the defendant's competence." *Camacho,* 561 N.W.2d at 172 (citing *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908 (1975)). When the evidence related to the defendant's competency is undisputed, an appellate court "must review the record to determine whether the district court gave proper weight to the information suggesting incompetence." *Id.* at 174.

In *Camacho*, the supreme court affirmed the district court's decision not to order a second competency evaluation of Camacho during his criminal trial. *Id.* at 175. On appeal, Camacho argued that his behavior during trial called his competence into question, citing (1) an outburst when he called a juror a "f-cking, lying b-tch," (2) his request for a second attorney, (3) his statement that the jury should begin deliberations after the close of the state's case, (4) an emotional outburst during trial, (5) his insistence on calling the murder-victim's mother as a witness, (6) his ambivalence over whether to testify, and (7) his misunderstanding of the consequences of a mental-illness defense. *Id.* at 174. Camacho also called witnesses to testify who offered evidence implicating him in the murder and evidence of his prior bad acts. *Id.* at 167. The supreme court concluded that this evidence "did not give the [district] court reason to doubt [Camacho's] competence," but "perhaps suggest[ed] lack of proper courtroom decorum and lack of technical legal knowledge." *Id.* at 174 (quotation omitted).

Appellant argues that the following incidents should have prompted the district court to question his competency to proceed and to represent himself during the

proceedings: (1) his request to sing for the district court, (2) his question to a potential juror regarding "the law of the pursuit of happiness," (3) his discussion of irrelevant incidents, (4) his admission to elements of the offense, (5) his confrontational cross-examinations, and (6) his method of cross-examination. But as in *Camacho*, we conclude that this conduct is attributable to appellant's lack of proper courtroom decorum, unfamiliarity with the process, and a lack of technical legal knowledge. During trial, appellant evidenced a reasonable degree of rational understanding regarding the proceedings, and the district court gave proper weight to the totality of the circumstances in deciding not to raise the issue of appellant's competence sua sponte.

IV.

Appellant challenges his 36-month sentence, arguing that the district court imposed an upward departure in violation of *Blakely*. Any fact that increases the sentence for a crime beyond the statutory maximum must be submitted to the fact-finder and be proven beyond a reasonable doubt. *State v. Shattuck*, 704 N.W.2d 131, 136 (Minn. 2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). The "statutory maximum" 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*." *Id.* at 137 (quoting *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004)).

The Minnesota Sentencing Guidelines provide that the presumptive sentence for an individual convicted of second-degree assault with a criminal-history score of zero[3] is 21 months stayed. Minn. Sent. Guidelines IV, V (2008). But section 609.11 includes a firearms enhancement that requires a minimum sentence of three years for a defendant convicted of second-degree assault who used a firearm at the time of the offense. Minn. Stat. § 609.11, subd. 5 (2008); *see also* Minn. Stat. § 609.11, subd. 9 (2008) (including second-degree assault in the list of applicable offenses). An aggravating factor requiring a finding beyond a reasonable doubt includes the firearms enhancement in section 609.11. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005). Therefore, in order for the district court to sentence appellant to the minimum sentence of three years articulated in the statute, the jury had to find that appellant did use a firearm beyond a reasonable doubt. *See id.*

Here, the jury convicted appellant pursuant to Minn. Stat. § 609.222, subd. 1 (2008), which provides that a person is guilty of second-degree assault if that person commits an assault with a dangerous weapon. A dangerous weapon includes, but is not limited to, a firearm. Minn. Stat. § 609.02, subd. 6 (2008) (defining dangerous weapon as a firearm, whether loaded or unloaded, or "any device designed as a weapon and capable of producing death or great bodily harm"). The jury instruction on the second element of second-degree assault stated: "the defendant, in assaulting [the victims], used a dangerous

[3] The district court file does not contain appellant's criminal-history score. In his brief, appellant asserts that his criminal-history score is zero, and the state does not contest that assertion. And during the sentencing hearing, the district court referred to the fact that appellant had "no criminal record at age 63." We therefore assume that appellant's presumptive sentence should be calculated using a criminal-history score of zero.

weapon. A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon." In finding appellant guilty of second-degree assault, the only fact the jury found beyond a reasonable doubt was that appellant used a dangerous weapon; the jury instructions did not require the jury to find specifically that appellant used a firearm. Therefore, because appellant's sentence is based on a fact not found beyond a reasonable doubt by the jury, the imposition of the three-year sentence provided by section 609.11 violates the requirements of *Blakely*.[4]

But *Blakely* errors are subject to a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). A *Blakely* error is harmless beyond a reasonable doubt if we 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). Appellant waived his Fifth Amendment right against self-incrimination by testifying on his own behalf. *See Mitchell v. United States*, 526 U.S. 314, 321, 119 S. Ct. 1307, 1312 (1999) ("The privilege [against self-incrimination] is waived for the matters to which the witness testifies . . . ."). And during his testimony, appellant conceded that he pointed a firearm at J.T. and J.K. that evening. We therefore conclude that the *Blakely* error is harmless, because no reasonable juror would have failed to find beyond a reasonable doubt that appellant used a firearm to commit his assault, had that issue been properly

[4] We note that courts in other jurisdictions have concluded that there is no *Blakely* error when a defendant admits to a fact necessary to increase his or her sentence during trial. *See, e.g., Galindez v. State*, 955 So.2d 517, 524 n.2 (Fla. 2007) (noting that testimony at a sentencing hearing or stipulations at trial may constitute "admissions" for purposes of *Blakely*).

submitted to the jury. *See, e.g.*, *United States v. Champion*, 234 F.3d 106, 110 (2d Cir. 2000) (holding that any *Blakely* error in imposing an aggravated sentence was harmless because the defendant stipulated to the facts necessary to impose the sentence at trial); *State v. Miranda-Cabrera*, 99 P.3d 35, 42 (Ariz. Ct. App. 2004) (holding that any *Blakely* error was harmless because the defendant testified at trial to the facts necessary to increase his sentence).

V.

In his pro se brief, appellant asserts that (1) his trial was unfair because he was not able to consult legal materials at the jail or given access to a private room to prepare for trial and a state witness did not testify; (2) the district court erred by refusing to admit evidence of a conversation between J.K. and an investigator that would show inconsistent statements; and (3) his sentence is unduly harsh. Appellant does not cite any authority or provide any argument to support his claims of error. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in a brief based on a mere assertion that is not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection). But we have nevertheless reviewed appellant's arguments and found them to be either duplicative of the arguments raised in his primary brief or without merit.

Affirmed.