STATE OF MINNESOTA
IN COURT OF APPEALS
A10-602

State of Minnesota,
Respondent,

vs.

Jedediah Matthew Svec,
Appellant

Filed March 1, 2011
Affirmed
Larkin, Judge

Pope County District Court
File No. 61-CR-09-154

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

Neil Nelson, Pope County Attorney, Chad M. Larson, Assistant County Attorney, Glenwood, Minnesota (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his second-degree assault conviction, claiming that his trial counsel was ineffective because counsel failed to request a voluntary-intoxication jury

instruction. Because the record is inadequate for review of appellant's ineffective-assistance-of-counsel claim, we do not reach the merits of the claim. Appellant also challenges his sentence, arguing that the district court erred by imposing a mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(a) (2008), in the absence of a jury finding that appellant possessed a firearm at the time of the offense. Because this error is harmless, we affirm.

FACTS

Appellant Jedediah Matthew Svec was charged with second-degree assault with a dangerous weapon, terroristic threats, fourth-degree assault, and obstructing legal process. The case was tried to a jury. At trial, Minnesota State Patrol Trooper Natalie Hanson testified that on March 13, 2009, she was monitoring traffic when she observed a vehicle traveling at 68 mph in a posted 55 mph speed zone. Hanson activated her squad car's emergency lights and followed the vehicle. The vehicle did not stop. Hanson activated her squad car's siren, shined a floodlight into the vehicle, and called dispatch. The vehicle eventually turned onto a long driveway and stopped in front of a farmhouse.

The passenger, later identified as Svec, and the driver, later identified as Svec's brother J., exited the vehicle. Hanson approached J., forced him to the ground, and attempted to handcuff him. Svec came around the back of the vehicle and became "fixated" on the fact that J.'s glasses had fallen off. Both Svec and J. yelled at Hanson, insisting that she could not be on the property.

Svec stated that he was going to go into the house and get a shotgun. Hanson ignored this statement. Svec again said that he was going to get a shotgun. J. began to

encourage Svec to retrieve the shotgun, and Svec went into the house. Around this time, Starbuck Police Chief James Minion arrived on the scene. Minion saw Svec walk out of the house with a shotgun over his shoulder, pointed straight up in the air. Hanson and Minion drew their weapons and ordered Svec to drop the gun. Svec did not immediately respond, but finally stated, "All right, I might as well unload it." Svec unloaded the gun, and the officers arrested him. This encounter was captured on a squad-car video recording.

Svec testified that he and J. drank beer throughout the afternoon and evening of March 13. He stated that he drank "too much" that day and only remembered "some parts" of what occurred that night. Hanson testified that she knew Svec had been drinking alcohol and that he appeared to be intoxicated. Minion testified that he detected an odor of alcohol coming from Svec and that Svec had very poor balance.

The jury found Svec guilty as charged. The district court sentenced Svec to 36 months in prison for second-degree assault with a dangerous weapon. This appeal follows.

D E C I S I O N

I.

Svec claims that his trial counsel was ineffective. "We review ineffective assistance of counsel claims de novo because they involve mixed questions of law and fact." *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

"A defendant has the right to effective assistance of counsel." *State v. Bobo*, 770 N.W.2d 129, 137 (Minn. 2009). Appellate courts use a "two-pronged analysis, focusing

on whether counsel's performance fell below an objective standard of reasonableness and whether a reasonable probability exists that the outcome would have been different but for counsel's errors, for determining whether a defendant should be granted a new trial because of his counsel's alleged ineffective assistance." *Id.* (quotation omitted).

"Under the first prong, a defendant must show that counsel's performance was deficient, which means that counsel's performance fell below an objective standard of reasonableness." *Id.* at 138 (quotations omitted). "Counsel acts within that objective standard of reasonableness when the attorney provides the client with the representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Id.* (quotation omitted). "There is a strong presumption that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). "Under the prejudice prong, a defendant must show that his counsel's errors so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Bobo*, 770 N.W.2d at 138.

Svec argues that his trial counsel was ineffective because he failed to request a jury instruction on the defense of voluntary intoxication. Svec asserts that a voluntary-intoxication instruction was warranted given the evidence and arguments presented at trial.

Minn. Stat. § 609.075 (2008) provides that

> [a]n act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to

> constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

The relevant model jury instruction states, in part:

> In this case, the defendant has introduced evidence of intoxication. It is not a defense to a crime that the defendant was intoxicated at the time of the act if the defendant voluntarily became intoxicated. However, if it is an element of a crime that the defendant had particular intent, you should consider whether the defendant was intoxicated, and if so, whether the defendant was capable of forming the required intent.

10 *Minnesota Practice*, CRIMJIG 7.03 (2006).

To receive a requested voluntary-intoxication jury instruction: "(1) the defendant must be charged with a specific-intent crime; (2) there must be evidence sufficient to support a jury finding, by a preponderance of the evidence, that the defendant was intoxicated; and (3) the defendant must offer intoxication as an explanation for his actions." *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001). "If the crime charged has a specific intent as an element and if intoxication is offered by the defendant as an explanation for his actions, then the court must give an instruction on intoxication." *Id.* (quotation omitted).

Assault is a specific-intent crime. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). And the trial evidence is sufficient to support a jury finding, by a preponderance of the evidence, that Svec was intoxicated. Finally, Svec offered intoxication as an explanation for his actions. In his opening statement, Svec's attorney conceded that Svec had a shotgun but told the jurors that Svec was intoxicated and that they had to decide

whether Svec had the intent to assault the officers. In his closing argument, Svec's attorney stated: "[W]hile intoxication is not a defense all by itself, it is something that you can consider to determine whether or not he was capable of forming the necessary intent to make this a criminal act." The record supports Svec's argument that he was entitled to a voluntary-intoxication jury instruction. *See State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977) ("[A] party is entitled to an instruction on his theory of the case if there is evidence to support it.").

But it does not necessarily follow that Svec's counsel was ineffective in failing to request the instruction. "To allow counsel flexibility to represent a client to the fullest extent possible" an appellate court's review of an attorney's performance "does not include reviewing attacks on counsel's trial strategy." *Blanche*, 696 N.W.2d at 376 (quotation omitted). And an "attorney's failure to request an intoxication jury instruction [may be] a matter of trial strategy." *See State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (concluding that attorney's failure to request instruction was a matter of trial strategy where attorney testified, at a postconviction hearing, that he made a tactical decision to focus on self-defense instead of intoxication). The state insists that "trial counsel made a tactical decision not to request a voluntary intoxication instruction." Svec counters that his counsel's failure to request the instruction was not strategic but rather "objectively unreasonable."

On this record, it is unclear whether defense counsel's failure to request a voluntary-intoxication instruction was tactical. On one hand, defense counsel's failure to request the instruction after asserting intoxication as a defense in opening and closing

statements suggests the failure may have been inadvertent. On the other hand, defense counsel argued other grounds for a finding of reasonable doubt as to intent, focusing in the end on stupidity.[1] Defense counsel's reliance on alternative arguments regarding intent suggests, as the state contends, that counsel "made a tactical decision to forego a voluntary intoxication instruction in lieu of a defense which seemed more palatable to the jury." But because the relevant facts are undetermined, we cannot ascertain whether counsel's failure to request the instruction was tactical. Nor can we properly consider whether defense counsel's performance was deficient.

Although an appellate court may review a claim of ineffective assistance of counsel on direct appeal when the record is sufficient, *Voorhees v. State*, 627 N.W.2d 642, 644 (Minn. 2001), "[g]enerally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) "A postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quotation omitted). The supreme court has declined to reach the merits of an ineffective-assistance-of-counsel claim when the record was inadequate to determine the claim. *See id.* (explaining that because "the record before us is devoid of the information needed to explain the attorney's decisions," any conclusions regarding whether the attorney's performance was deficient would be "pure speculation," and preserving the defendant's right to pursue her

[1] In closing, defense counsel stated: "You know stupid is not a crime, and certainly what he did was not right. You know, he was just not thinking, but that does not make it criminal and that's why it should be not guilty. Thank you."

ineffective-assistance-of-counsel claim in a postconviction petition). Because the record here is inadequate, we do not reach the merits of Svec's ineffective-assistance-of-counsel claim. Instead, we preserve Svec's right to pursue the claim in a timely postconviction proceeding.

II.

Svec argues that the district court's imposition of a 36-month mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(a), in the absence of a finding that he possessed or used a firearm in the commission of the assault, violated his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). This argument "presents a constitutional issue, which this court reviews de novo." *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004).

In *Apprendi v. New Jersey*, the United State 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, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). The Supreme Court subsequently held that "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. "The defendant has a Sixth Amendment right to a jury determination of the existence beyond a reasonable doubt of any fact, except the fact of a prior conviction, that increases the sentence above this maximum." *Hagen*, 690 N.W.2d at 158.

Minn. Stat. § 609.11, subd. 5(a) provides, in relevant part:

> Except as otherwise provided in paragraph (b), any defendant convicted of an offense listed in subdivision 9 in which the defendant or an accomplice, at the time of the offense, had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm, shall be committed to the commissioner of corrections for not less than three years, nor more than the maximum sentence provided by law.

Minn. Stat. § 609.11, subd. 9 (2008) includes the offense of second-degree assault.

Following *Blakely*, the Minnesota Supreme Court held that the imposition of a mandatory-minimum sentence under Minn. Stat. § 609.11 based on the district court's determination that a firearm was used or possessed during the commission of an offense violates a defendant's right to a jury trial on that sentencing factor. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005). Here, the jury was not asked to determine whether Svec possessed or used a firearm at the time of the offense. And although Svec testified that he possessed a firearm at the time of the offense, this testimony cannot be the basis for sentencing enhancement because Svec did not waive his right to a jury determination of this factor. *See State v. Dettman*, 719 N.W.2d 644, 646 (Minn. 2006) ("An express, knowing, voluntary, and intelligent waiver of the right to a jury determination of facts supporting an upward sentencing departure is required before a defendant's statements at his guilty-plea hearing may be used to enhance his sentence beyond the maximum sentence authorized by the facts established by his guilty plea."). The district court erred in imposing an enhanced sentence without a jury finding that Svec possessed or used a weapon.

However, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 2553 (2006). Therefore, "*Blakely* errors . . . are subject to a harmless error analysis." *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). "An error is not harmless if there is any reasonable doubt the result would have been different if the error had not occurred." *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006).

Svec argues that the *Blakely* error in this case is not harmless, asserting that "if the error increases the sentence beyond what otherwise would be available, the error is not harmless." Although the supreme court has found a *Blakely* error prejudicial solely because the error resulted in a longer sentence, *State v. Osborne*, 715 N.W.2d 436, 447 (Minn. 2006) ("Because the upward departures increased the length of Osborne's governing sentence by 67 months, the *Blakely* error was necessarily prejudicial, not harmless."), the court has also indicated that a *Blakely* error is harmless 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*." *Dettman*, 719 N.W.2d at 655. Svec contends that the latter approach is impermissible, arguing that "to deem a *Blakely* error harmless based upon a qualitative review of the record is akin to the pre-*Blakely* practice of scouring the record to determine whether there existed sufficient evidence to justify the departure." Svec cites *State v. Jackson* as support. 749 N.W.2d 353 (Minn. 2008). But *Jackson* refers to the practice of scouring the record for additional reasons to support a departure where the stated reasons are inappropriate or inadequate. *See id.* at 358 ("Pre-*Blakely*, when the

reasons stated on the record for a departure were improper or inadequate, we independently examined the record to determine whether there was sufficient evidence 'to justify departure for legitimate reasons.'" (quoting *State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008) (other quotation omitted)). Because this case does not involve stated departure grounds that are allegedly inappropriate or inadequate, *Jackson* is inapposite.

Svec also argues that the error was not harmless because a fact used to enhance a sentence is the functional equivalent of an element of a greater offense and appellate courts "have consistently held that when an erroneous jury instruction eliminates a required element of the crime [the] error is not harmless beyond a reasonable doubt." *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007); *State v. Hall*, 722 N.W.2d 472, 479 (Minn. 2006). In *Mahkuk* and *Hall*, the supreme court concluded that erroneous instructions were not harmless because it was possible that the instructions resulted in faulty jury reasoning and unsupported convictions. *Mahkuk*, 736 N.W.2d at 683 ("The court's instructions left the jury with the impression that [defendant's] intentional presence was sufficient to find guilt without also requiring the jury to find that he intended his presence to encourage or further the commission of the crime. For these reasons, we cannot say that the errors were harmless beyond a reasonable doubt."); *Hall*, 722 N.W.2d at 479 ("Because the transferred intent instruction pertained directly to the element of premeditation and because that instruction relieved the jury of its obligation to find that the element of premeditation was satisfied, the instruction was not harmless."). Unlike *Mahkuk* and *Hall*, this case does not involve a jury finding that is of questionable

validity due to an erroneous instruction. Svec's reliance on *Mahkuk* and *Hall* is therefore not persuasive.

We follow the supreme court's approach in *Dettman*. Hanson and Minion both testified that Svec emerged from the house with a shotgun, the trial exhibits include a squad-car video that shows Svec exiting the house with a shotgun, and the shotgun was admitted into evidence. On this record, we can say with certainty that the jury would have found that Svec possessed or used a firearm at the time of the offense if it had been asked to do so in compliance with *Blakely*. *See Dettman*, 719 N.W.2d at 655. We therefore conclude that the *Blakely* error is harmless.

Svec also contends that because the district court failed to state a reason for the departure at the time of sentencing, the case must be remanded for imposition of the presumptive sentence. This argument is based on the rule, re-affirmed in *State v. Geller*, that "absent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed." 665 N.W.2d 514, 517 (Minn. 2003). "[T]his rule is consistent with the requirements of the sentencing guidelines and necessary to ensure compliance with them." *Id*. Under the sentencing guidelines,

> [T]he judge shall pronounce a sentence within the applicable [guidelines] range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids. A sentence outside the applicable range on the grids is a departure from the sentencing guidelines and is . . . an exercise of judicial discretion constrained by case law and appellate review. However, in exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that

> make the departure more appropriate than the presumptive sentence.

Minn. Sent. Guidelines II.D (2008).

A sentence under section 609.11, subd. 5(a), is treated as a departure for *Blakely* purposes. *See Barker* 705 N.W.2d at 773 (holding that "section 609.11 is unconstitutional to the extent that it authorizes the district court to make an upward durational departure upon finding a sentencing factor without the aid of a jury or admission by the defendant"). But it is not clear that the *Geller* rule, which was originally adopted to ensure future compliance with sentencing-guidelines requirements, applies to a mandatory minimum sentence under section 609.11. *See Geller*, 665 N.W.2d at 516 (discussing the reasons for adoption of the rule). Unlike a discretionary decision to depart from the presumptive guidelines sentence based on substantial and compelling circumstances, imposition of an enhanced sentence under section 609.11 is automatic upon the finding of a triggering factor. *See Barker*, 705 N.W.2d at 772 (explaining that section 609.11 creates an "*alternative* presumptive sentence" that is triggered by the finding of an enumerated factor (quotation omitted)); Minn. Sent. Guidelines cmt. II.E.03 (2008) (stating that "[i]f the court makes a finding that a dangerous weapon was involved, the mandatory minimum applies pursuant to Minn. Stat. § 609.11"). Indeed, a district court may sentence a defendant without regard to the mandatory minimum sentences established in section 609.11 only if the court finds substantial and compelling reasons to do so, in which case, the sentence constitutes a downward departure. *See* Minn. Stat. § 609.11, subd. 8 (2008); Minn. Sent. Guidelines cmt. II.E.03 (explaining that

when a motion to sentence apart from the mandatory minimum is made, "the presumptive disposition for the case is still imprisonment and the presumptive duration is the mandatory minimum sentence prescribed for the conviction offense or the cell time, whichever is greater").

Because imposition of a mandatory minimum sentence under section 609.11 is automatic upon the finding of a triggering factor, we discern no reason to apply a rule that was adopted to ensure compliance with sentencing-guidelines requirements related to discretionary departures. We also note that despite the district court's failure to cite section 609.11 at sentencing, Svec clearly understands the reason for the sentencing departure. Thus, we are not persuaded that reversal is necessitated by the district court's failure to cite section 609.11 and Svec's possession or use of a firearm as the reasons for departure.

Affirmed.

Dated:

Judge Michelle A. Larkin