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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0533**

State of Minnesota,
Respondent,

vs.

Amy Kathleen Sparks,
Appellant

**Filed February 4, 2019
Reversed and remanded; motion denied
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-17-1320

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from the judgment of conviction, appellant Amy Kathleen Sparks argues that the district court violated her right to a *Blakely* trial by imposing a 36-

month mandatory-minimum sentence under Minn. Stat. § 609.11, subd. 5(a) (2016), without obtaining a *Blakely* waiver. We deny the state’s motion to strike portions of appellant’s reply brief. Because appellant did not waive her right to a jury determination of facts necessary for the sentence imposed by the district court, that sentence must be reversed, and we remand to the district court for resentencing.

FACTS

Officers of the Minneapolis Police Department executed a search warrant at appellant’s home. According to the criminal complaint, officers found 110 marijuana plants in the basement of the home and a .32 caliber revolver, with 6 rounds of .32 ammunition, inside a case within one foot of the marijuana plants. The state charged appellant with second-degree and fifth-degree controlled-substance crimes. The state amended its complaint, adding a sentencing enhancement under Minn. Stat. § 609.11, subd. 5(a), to both charges for possessing a firearm while committing the charged offenses. Section 609.11 imposes a mandatory-minimum sentence of 36 months in cases where the defendant possesses or uses a firearm while committing “a felony violation of chapter 152.” Minn. Stat. § 609.11, subd. 9 (2016).

Appellant moved to dismiss the charged sentencing enhancement under *State v. Royster*, 590 N.W.2d 82 (Minn. 1999), arguing that the state had not shown probable cause to believe that she possessed or used a firearm at the time of the offense. The district court denied appellant’s *Royster* motion, finding that the constructive-possession-of-a-firearm evidence was sufficient to proceed to trial. Appellant then pleaded guilty to the fifth-degree controlled-substance crime in exchange for the state dismissing the second-degree charge.

Appellant's was a "straight plea," meaning that there was no agreement concerning sentencing. But appellant acknowledged that the guidelines sentence (with the sentencing enhancement statute) is three years in prison and that she would be requesting a downward dispositional departure. The plea petition indicates that appellant was informed that "if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than 36 months for this crime."

The plea petition advised appellant of her right to a jury trial on the issue of guilt, which she waived. The petition did not contain an explicit waiver of appellant's right to have a jury make findings concerning aggravating factors or the charged sentencing enhancement for a firearm. Appellant acknowledged at the plea hearing that she was giving up her right to a jury trial on the issue of her guilt as part of the plea agreement. But appellant was not informed that she had a right to a jury trial for the section 609.11 sentencing enhancement.

At sentencing, the district court stated that it would have departed from the guidelines but declined to do so in light of appellant's intervening fifth-degree controlled-substance crime—a new offense that appellant committed one week after she pleaded guilty in this case. The district court sentenced appellant to 36 months in prison, applying the sentencing enhancement under section 609.11.

This appeal followed.

DECISION

Appellant argues that the district court violated her right to a *Blakely* trial when it imposed a mandatory-minimum sentence of 36 months in prison without obtaining a valid

Blakely waiver. The United States and Minnesota Constitutions guarantee criminal defendants the right to a trial by jury. U.S. Const. amend. VI; Minn. Const. Art. 1, § 6. “Other 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.” *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). “*Blakely* reformulated the definition of ‘statutory maximum’ as the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *State v. Dettman*, 719 N.W.2d 644, 647 (Minn. 2006) (quoting *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537). The presumptive sentence under the Minnesota Sentencing Guidelines is the “statutory maximum” for *Blakely* purposes. *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005).

A defendant has a constitutional right to a jury trial on a sentencing enhancement under Minn. Stat. § 609.11. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005). A waiver on the issue of guilt alone cannot be interpreted as a waiver of the right to a jury determination of aggravating sentencing factors. *Dettman*, 719 N.W.2d at 654. “[A] defendant must expressly, knowingly, voluntarily, and intelligently waive [her] right to a jury determination of facts supporting an upward sentencing departure before [her] statements at [her] guilty-plea hearing may be used to enhance [her] sentence.” *Id.* at 650-51.

The state agrees with appellant that the district court erred by departing from the guidelines sentence without obtaining a *Blakely* waiver. The parties disagree on the

appropriate remedy.¹ Appellant argues that “this case must be remanded for imposition of the presumptive one-year-and-one-day stayed guidelines sentence.” The state argues that, on remand, the district court should empanel a sentencing jury for the section 609.11 enhancement or allow appellant to properly waive a jury trial. Appellant argues in her reply brief that her double-jeopardy rights would be violated if a sentencing jury were empaneled.

Motion to Strike

After the parties submitted their briefing, the state moved to strike appellant’s double-jeopardy argument from her reply brief on the grounds that it is a new argument that was not raised in appellant’s principal brief and exceeded the scope of respondent’s brief. The motion was deferred to this merits panel by order of the chief judge.

It is well established that an appellate court does not consider arguments that are raised for the first time in a reply brief. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). But a reply-brief argument is properly before the court if it responds to new points made by respondent. *Albert Lea Ice & Fuel Co. v. U.S. Fire Ins. Co.*, 58 N.W.2d 614, 619 (Minn. 1953). The reply brief must be confined to new matter raised in the respondent’s brief. Minn. R. Civ. App. P. 128.02, subd. 3; see *Goeman v. Allstate Ins. Co.*, 725 N.W.2d 375, 378 (Minn. App. 2006) (an argument in reply that “offers a rebuttal of the arguments raised by” the respondent is properly before the court, and reply briefs are “liberally construed to

¹ *Blakely* errors are subject to a harmless-error analysis, *Dettman*, 719 N.W.2d at 655, but the state expressly disclaims any argument that the error here was harmless. And we agree that the error was not harmless.

allow the appellant to respond to the arguments advanced by the respondent” (quotations omitted)).

Appellant’s argument—that her double-jeopardy rights would be violated if the district court empanels a sentencing jury on remand—is directly responsive to the state’s argument that the district court should empanel a sentencing jury on remand. Accordingly, appellant’s double-jeopardy argument is proper and the state’s motion to strike is denied.

Appropriate Remedy on Remand

Having determined that there was a *Blakely* error and having denied the state’s motion to strike, we arrive at the real issue in this case—the appropriate remedy for the admitted *Blakely* violation. Appellant argues that the district court must impose the presumptive sentence on remand; the state argues that the district court should empanel a sentencing jury on remand.

Appellant argues that caselaw requires that we remand with instructions that the district court impose the presumptive guidelines sentence. *State v. Her*, 862 N.W.2d 692, 700 n.4 (Minn. 2015); *Hankerson v. State*, 723 N.W.2d 232 (Minn. 2006); *Barker*, 705 N.W.2d at 768.

In *Barker*, after reversing the defendant’s *Blakely*-infirm sentence, the supreme court rejected the state’s argument that it should direct the district court to empanel a sentencing jury on remand. 705 N.W.2d at 776. At that time, Minnesota law did not explicitly authorize empaneling a sentencing jury. *Id.* at 775-76. The supreme court has subsequently explained that “[a]lthough we declined for comity reasons to exercise our inherent judicial authority to authorize sentencing juries [in *Barker*],” the comity reasons

no longer apply “in light of the 2005 legislation retroactively authorizing the use of juries on resentencing.”² *State v. Chauvin*, 723 N.W.2d 20, 21 (Minn. 2006). Consequently, *Barker* does not require the district court in this case to impose the presumptive guidelines sentence on remand because Minnesota law after 2005 provides for sentencing juries with respect to section 609.11 sentencing enhancements. Minn. Stat. § 244.10, subd. 5 (2016).

In *Her*, the supreme court held that the district court erred by imposing a conditional-release term of 10 years based on its finding that Her was a “risk-level-III offender at the time of his offense,” because Her had the right to have a jury make such a determination. 862 N.W.2d at 694. The supreme court remanded the case to the district court, but expressed no opinion concerning the appropriate remedy on remand, because neither party had addressed, nor did the supreme court grant review, on that issue. *Id.* at 700 n.4.

In *Hankerson*, after being found guilty by a jury, Hankerson filed a petition for postconviction relief challenging her aggravated sentence because it was based on judicial factfinding in violation of *Blakely*. 723 N.W.2d at 232. The postconviction court denied her request to vacate her sentence and impose the presumptive guidelines sentence, but ordered a sentencing hearing in which it proposed to empanel a sentencing jury as authorized by legislative amendments to Minn. Stat. § 244.10, subd. 5(a), in response to

² Minn. Stat. § 609.11, subd. 5(a) (2004) (amended June 1, 2006, eff. Aug. 1, 2006); 2006 Minn. Laws ch. 260, art. 1, §§ 1-3, at 708-09.

Blakely.³ *Id.* at 233. Hankerson argued that she was entitled to the presumptive guidelines sentence on remand, but the Minnesota Supreme Court held that the district court was authorized to empanel a sentencing jury on remand. *Id.* at 236. The supreme court rejected Hankerson’s double-jeopardy argument because of “the failure to show that the proposed resentencing hearing would be a ‘second prosecution.’” *Id.* at 237.

The supreme court reasoned that a “second prosecution” can occur only after jeopardy from the first prosecution has terminated. *Id.* (citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736-37 (2003)). In *Hankerson*, the Minnesota Supreme Court reiterated that, under *Sattazahn*, “jeopardy does not terminate unless the fact finder affirmatively rejects the existence of aggravating factors in a manner than can fairly be called an ‘acquittal’ on those factors.” *Id.* “[T]he Double Jeopardy Clause’s general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside.” *Id.* at 238 (quoting *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S. Ct. 285, 289 (1988)). In *Lockhart*, the Supreme Court recognized that the only exception to this rule is where the conviction is reversed on the grounds that the evidence was insufficient to sustain the jury’s verdict, because in such a scenario, the evidence is so lacking that the trial court should enter a judgment of acquittal, rather than submit the case to the jury. *Lockhart*, 488 U.S. at 39, 109 S. Ct. at 290 (citing *Burks v. United States*, 437 U.S. 1, 16-17, 98 S. Ct. 2141, 2149-50 (1978)).

³ “[T]he legislature responded to *Blakely* by amending section 244.10, subd. 5(a), and Minn. Sent. Guidelines II.D to provide for sentencing juries and bifurcated trials.” *Hankerson*, 723 N.W.2d at 234 (citations omitted).

Applying the reasoning of *Sattazahn* and *Lockhart*, the Minnesota Supreme Court stated in *Hankerson* that double jeopardy would apply if: (a) the state in the first trial had not sought an aggravated sentence or the district court had “acquitted” the defendant of the aggravating factors; or (b) if the state had presented insufficient evidence to support the district court’s adoption of the aggravating factors in the first trial, in which case the *Burks* exception might preclude consideration of the aggravated sentencing factors on resentencing. *Hankerson*, 723 N.W.2d at 238-39; *see also Burks*, 437 U.S. at 18, 98 S. Ct. at 2150-51 (recognizing exception to general rule—that the Double Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting a conviction set aside for error in proceedings below—and holding that when a defendant’s conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury’s verdict, the Double Jeopardy Clause bars a retrial on the same charge).

Appellant argues that the Double Jeopardy Clause prevents empaneling a sentencing jury because the evidence was insufficient to support the basis for appellant’s sentence. To the contrary, before appellant pleaded guilty, the district court found that the evidence was sufficient to establish probable cause supporting a constructive-possession-of-a-firearm sentencing enhancement under section 609.11. The insufficient-evidence exception that invokes double jeopardy applies where the evidence was insufficient to sustain the jury’s verdict. *Lockhart*, 488 U.S. at 39, 109 S. Ct. at 291. Even though the district court did not find the aggravating factors beyond a reasonable doubt as required by *Blakely*, the district court’s adoption of the aggravating factors under a lesser standard of proof is not equivalent to an “acquittal” on those factors for double-jeopardy purposes. *Hankerson*, 723 N.W.2d

at 239. We do not reverse appellant's sentence on grounds that the evidence is insufficient or was affirmatively rejected by the trier of fact. We reverse appellant's enhanced sentence because she did not waive her right to a *Blakely* trial on the facts that support an enhanced sentence.

After *Hankerson*, we have affirmed the district court's authority to empanel a resentencing jury in factual scenarios similar to the one here, where the district court's aggravated sentence violates the rule in *Blakely*. See *State v. Spraggins*, 742 N.W.2d 1, 6 (Minn. App. 2007) ("the use of sentencing juries has now been recognized as proper, and the district court may use such a procedure on remand in this case."). Likewise, in *State v. Jones*, the supreme court held that Jones was entitled to a jury determination of the facts that would justify an enhanced sentence, and therefore reversed the enhanced sentence and remanded for sentencing where "the district court may impose the presumptive guidelines sentence or, unless waived by Jones, empanel a resentencing jury." 745 N.W.2d 845, 851 (Minn. 2008). Ultimately, a defendant "can hardly complain that she is still in jeopardy" when she is the one who requests the sentence be vacated. *Hankerson*, 723 N.W.2d at 239. The district court may empanel a resentencing jury on remand without violating appellant's double-jeopardy rights.

Appellant also argues that we must remand the case to the district court with instructions to impose the presumptive guidelines sentence because the district court did not make the necessary *Royster* findings to support the upward departure under Minn. Stat. § 609.11, subd. 5(a).

In *Royster*, the Minnesota Supreme Court held that constructive possession of a firearm can be sufficient to trigger the sentencing enhancement under Minn. Stat. § 609.11, subd. 5. 590 N.W.2d 82 (Minn. 1999). In determining whether the constructive possession of a firearm triggers the mandatory minimum sentence under § 609.11, the supreme court stated that it is reasonable to examine all aspects of the firearm possession to determine whether it was reasonable to conclude that its presence increased the risk of violence and to what degree the risk is increased. *Id.* The supreme court stated that the considerations include, “the nature, type and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the drugs, why the firearm was present and whether the nature of the predicate offense is frequently or typically accompanied by use of a firearm.” *Id.*

Appellant argues that, because the district court did not make these findings on the record before she was sentenced, remand to the district court for another opportunity to state the reasons for departure is improper. Appellant cites *State v. Geller*, which held 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) (affirming rule from *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985)).

Appellant’s reliance on *Geller* is misplaced. Appellant pleaded guilty to the fifth-degree controlled-substance crime, with the section 609.11 sentencing enhancement charged (notwithstanding the fact that the state did not obtain a proper jury waiver). As charged, the enhanced fifth-degree controlled-substance crime carries a minimum sentence of 36 months’ imprisonment. The district court sentenced appellant to 36 months’

imprisonment. Therefore, as the district court correctly noted in the warrant of commitment, the district court imposed the mandatory 36-month imprisonment based on the presence of a firearm. The infirmity in the process was that appellant neither admitted nor waived a jury regarding the firearm enhancement, but the district court treated her guilty plea as one including the enhancement. That oversight by the district court cannot now give appellant the legal windfall of avoiding entirely the possibility of the firearm-enhanced sentence.

Effect on Plea Agreement

The state argues that remanding with instructions that the district court impose the presumptive sentence without empaneling a sentencing jury would violate the understanding made at the time of the plea. The state contends that, while there was no agreement on sentence, the state dismissed the charge for a second-degree controlled-substance crime and appellant “agreed to plead guilty to the fifth-degree charge *with* the 609.11 enhancement.”

In *State v. Misquadace*, the Minnesota Supreme Court held that an upward departure in a criminal sentence cannot be based solely on a plea agreement. 644 N.W.2d 65, 71 (Minn. 2002). In *State v. Lewis*, the Minnesota Supreme Court held that, if the district court finds that the sentence agreed upon in a plea bargain must be materially reduced, it may reconsider the entire plea agreement because the conviction and sentence components of a plea are interrelated. 656 N.W.2d 535, 538-39 (Minn. 2003). Here, the parties did not agree on a sentence, but the state made clear that it was seeking a section 609.11 enhancement and the district court denied appellant’s motion to remove the section 609.11

enhancement from the complaint. When asked if “you understand the existence of the section 609.11 qualifier, along with this charge here, does presume a 36-month commit to the Commissioner of Corrections,” appellant responded affirmatively.

We therefore reverse appellant’s sentence and remand to the district court for resentencing. On remand, the district court may impose the presumptive guidelines sentence, empanel a sentencing jury, or obtain appellant’s express waiver of a sentencing jury.

Reversed and remanded; motion denied.