STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0107

State of Minnesota,
Respondent,

vs.

TS'John Thomas Reed,
Appellant.

Filed April 24, 2023
Affirmed
Jesson, Judge

Ramsey County District Court
File No. 62-CR-20-2976

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

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Bjorkman, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

As appellant TS'John Thomas Reed stood in a convenience-store line to order food, he was confronted by another customer (D.V.) regarding who was next in line. A heated

exchange between the two men ensued, which began with words but rapidly escalated into a physical altercation, culminating with Reed fatally shooting D.V. in his chest and abdomen.

Reed pleaded guilty to second-degree unintentional murder. The plea petition provided that respondent State of Minnesota could argue for an upward durational departure and that Reed "does not agree that there are aggravating factors but agrees to allow the court to make that determination and waives *Blakely*." *See generally Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining that every fact that supports an enhanced sentence must be found by a jury or admitted by the defendant). After receiving stipulated evidence (including a surveillance video of the shooting), the district court determined that the state had proved a basis for an upward durational sentencing departure because the offense created a greater-than-normal danger to the safety of others. But while the court concluded it had the legal authority to sentence Reed to an upward durational departure, it imposed a presumptive "top-of-the-box" sentence instead.

In a postconviction petition requesting an evidentiary hearing, Reed argued that he did not validly waive his Sixth Amendment right (referred to as a *Blakely* waiver) to have a jury determine whether circumstances justified an upward durational departure. Reed now appeals the denial of that petition. Because the district court did not sentence Reed to an upward durational departure and any potential error in Reed's *Blakely* waiver was harmless beyond a reasonable doubt, we affirm.

FACTS

Pursuant to a plea agreement, Reed pleaded guilty to one count of second-degree unintentional murder.[1] In exchange for Reed's guilty plea, the state agreed to dismiss the second-degree intentional-murder charge.

At the subsequent plea hearing, the state detailed the plea agreement the parties previously accepted. The plea agreement granted Reed the opportunity "to argue for [the] low end of the guideline of 128 months" at sentencing. And the state was free to argue for an upward durational departure of up to 240 months' imprisonment. As a caveat to the state's requested sentencing departure, Reed would be required to further "agree to have the [c]ourt decide . . . whether or not the *Blakely* factor is present."

Next, for the factual basis of his plea, Reed testified that on May 1, 2020, he left his fiancée's home to pick up food. Reed brought two 9mm pistols with him as he drove around St. Paul looking for a business that was open despite widespread COVID-19-pandemic restrictions. Reed found an open convenience store and went inside to place his order. According to Reed's testimony, there was a long line of customers waiting to place orders, so he took his place in line and began reviewing the menu. Reed testified that, while waiting in line, D.V. approached him and tried to shove Reed out of the line. Reed told D.V. that he had a firearm on his person. D.V., who Reed testified was unarmed, walked away from Reed. Reed pointed a pistol at D.V.'s back as he walked away

[1] Reed pleaded guilty to violating Minnesota Statutes section 609.19, subdivision 2(1) (2018), which states that whoever causes the death of a human being, without intent to cause the death of any person, while committing or attempting to commit a felony offense is guilty of unintentional murder in the second degree.

from Reed. According to Reed, the two men exchanged words and, at some point, Reed's pistol was fired at least twice, fatally wounding D.V. in his chest and abdomen.

The district court accepted Reed's guilty plea. But although Reed waived his trial rights during the plea hearing—and while he repeatedly and generally waived his right to a jury determination of an aggravating factor—his oral waiver did not address the specific rights set forth in the Minnesota Rules of Criminal Procedure.[2] Nor does the record contain a written *Blakely* waiver. But the plea hearing included the following questions and answers concerning the waiver:

> Defense Counsel: Now, because we've stipulated to a range where the upper part of the range, the 240, is 60 months higher than the top end of the guidelines, the judge needs to have authority to do that, and as part of this, normally, you would have the right to have a jury trial . . . and the jury would determine whether or not there are aggravating factors; do you understand that?
>
> Reed: Yes, sir.
>
> Defense Counsel: And I talked to you about what *Blakely* means, and that . . . we're not agreeing to the aggravating factors, . . . right?
>
> Reed: Yes.
>
> Defense Counsel: *What we're allowing the judge to do is make that determination, just waive your right to have a jury trial on that issue and the judge will make that determination*. And we can argue against it, but that's what's going to happen. Is that ok with you?

[2] To waive a jury trial under Rule 26.01, subdivision 1(2), of the Minnesota Rules of Criminal Procedure, the defendant must waive the right: (1) to testify at trial; (2) to have the prosecution witnesses testify in open court in the defendant's presence; (3) to question those prosecution witnesses; and (4) to require any favorable witnesses to testify for the defense in court. Minn. R. Crim. P. 26.01, subd. 3(b)(1)-(4).

> Reed: Yes, sir.
>
> Defense Counsel: You would waive your right to have a jury make that determination, correct?
>
> Reed: Yes, sir.

(Emphasis added.) Further the district court directly reviewed Reed's *Blakely* rights with Reed, stating:

> District court: [Defense counsel] did a good job in covering your rights, but I just want you to understand *Blakely*-wise, you could have a hearing. It's like a trial. It is a trial. And you could choose a jury to decide whether or not there are aggravating factors to go beyond 180 months, right?
>
> Reed: Yes, Your Honor.
>
> District court: And you are choosing to let me decide that issue, correct?
>
> Reed: Yes, sir.[3]

At the conclusion of the plea hearing, the district court made a finding that Reed understood his right to have a jury determine whether an aggravating factor existed and that he waived that right.

The parties then submitted stipulated orders and written arguments to the district court regarding whether aggravating circumstances supported an upward durational departure. The district court determined that there was one aggravating factor, "which is that [Reed] created a greater than normal danger to the safety of other people in committing

[3] At the sentencing hearing, the district court also addressed Reed's *Blakely* waiver. Both parties agreed that while no documented waiver was in the record, Reed had expressed his *Blakely* waiver orally at the plea hearing.

the offenses due to the presence of numerous people around" at the time of the offense. But the district court also found that a mitigating factor existed. Accordingly, the district court denied the state's motion for an upward durational departure and imposed an executed sentence of 180 months, a presumptive "within-the-box" sentence.

In January 2022, Reed filed a notice of appeal with this court. This court stayed the appeal to allow Reed to pursue postconviction relief. In his postconviction petition, Reed challenged the validity of his *Blakely* waiver. The postconviction court denied the petition without holding an evidentiary hearing, determining that any error in Reed's *Blakely* waiver was harmless.

Reed appeals.

DECISION

Reed challenges the summary denial of the postconviction petition, arguing that the postconviction court abused its discretion by denying the petition. Generally, we review the denial of a postconviction petition without an evidentiary hearing for an abuse of discretion. *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014). To receive an evidentiary hearing, Reed's postconviction petition must allege facts that, if proven by a fair preponderance of the evidence, would satisfy the *Blakely* test set forth below. *Thoresen v. State*, 965 N.W.2d 295, 309 (Minn. 2021).

We begin our analysis with examination of what has become known as a "*Blakely* waiver." The United States and Minnesota Constitutions guarantee criminal defendants the right to a jury trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. And under the Sixth Amendment, a defendant has the right "to be sentenced based solely upon *factual*

findings made by a jury." *State v. Reimer*, 962 N.W.2d 196, 198 (Minn. 2021) (emphasis added). "[A]ny 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*, 542 U.S. at 301 (quotation omitted). But that right—like other trial rights—may be waived. *Id.* at 310. And a defendant's waiver of this right is considered valid if it is knowing, voluntary, and intelligent. *State v. Dettman*, 719 N.W.2d 644, 650-51 (Minn. 2006).

When the defendant personally waives their sentencing-trial right in writing or on the record in open court after being advised of the right to a trial by jury and has had an opportunity to speak with counsel, their *Blakely* waiver is considered knowing, voluntary, and intelligent. *See State v. Thompson*, 720 N.W.2d 820, 827-28 (Minn. 2006) (citing Minn. R. Crim. P. 26.01, subd. 1(2)(a)). Whether a *Blakely* error has occurred is a legal question we review de novo. *Dettman*, 719 N.W.2d at 648-49.

We conclude no *Blakely* error occurred because Reed received a presumptive sentence. The root of a *Blakely* violation is the imposition of an *upward departure* based on facts not submitted to a jury and proved beyond a reasonable doubt or not waived by the defendant. Here, the district court did not impose an upward durational departure on Reed. Rather, the district court imposed an executed sentence of 180 months, a presumptive sentence because it falls within the presumptive range of 128-180 months. Thus Reed's argument here does not succeed because there was no *Blakely* violation.

But even if a *Blakely* violation exists, we review that error to determine whether it is harmless beyond a reasonable doubt. *Reimer*, 962 N.W.2d at 199. "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*." *State v. Essex*, 838 N.W.2d 805, 813 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Jan. 21, 2014).

Here, even if *Blakely* were implicated by a presumptive sentence—and assuming Reed's *Blakely* waiver was invalid—we conclude that any potential error was harmless beyond a reasonable doubt.[4] We so conclude based on the strength of the evidence—particularly the surveillance video footage—which the district court reviewed as a fact finder with regard to the existence of an aggravating factor. That evidence strongly supports the finding that Reed's offense created a greater-than-normal danger to the safety of others. The surveillance footage shows at least seven people present during the incident while Reed had the gun in his hand, and at least seven people were present in the small convenience store when Reed shot D.V. This conduct is more serious than a typical second-degree unintentional murder crime given the number of potential victims in a tight space when Reed was threatening D.V. with his gun and subsequently shooting D.V. *See, e.g.*, *State v. Fleming*, 883 N.W.2d 790, 797 (Minn. 2016) (explaining that firing a gun six times in a park filled with children makes an illegal possession of a firearm conviction significantly more serious than a typical offense because of the large number of potential victims).

[4] We note that the state concedes that Reed's oral waiver did not include the individual waivers required by rule 26.01, subdivision 3(b)(1)-(4), of the Minnesota Rules of Criminal Procedure.

In sum, we discern that no *Blakely* waiver error occurred given that the district court did not give Reed a sentence with an upward durational departure. And any error would have been harmless beyond a reasonable doubt given the strength of the evidence supporting the aggravating factor.[5]

Affirmed.

[5] Because Reed's postconviction petition does not allege sufficient facts that would warrant relief, he is not entitled to an evidentiary hearing on his postconviction petition. *Thoresen*, 965 N.W.2d at 309.