STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1475

State of Minnesota,
Respondent,

vs.

Christopher Jerome Endicott,
Appellant.

Filed July 13, 2020
Affirmed
Reilly, Judge

Dakota County District Court
File Nos. 19HA-CR-18-1465, 19HA-CR-18-547, 19HA-CR-18-720

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

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

REILLY, Judge

In this direct appeal from judgments of conviction, appellant argues that he is entitled to be resentenced to the presumptive guidelines sentence for his identity-theft

conviction because (1) although appellant waived his right to a *Blakely* jury trial, he did not waive his right to a *Blakely* court trial and did not admit to the existence of any aggravating factors, and (2) the district court erred by imposing an upward durational departure based on aggravating circumstances unsupported by the record. We affirm.

FACTS

In June 2018, respondent State of Minnesota charged appellant Christopher Jerome Endicott with one count of felony identity theft (more than eight direct victims) in violation of Minn. Stat. § 609.527, subd. 2 (2016), and one count of felony financial transaction card fraud in violation of Minn. Stat. § 609.821, subd. 2(1) (Supp. 2015).[1] In February 2019, appellant pleaded guilty to identity theft and respondent dismissed the financial transaction card fraud charge. Respondent filed notice that it intended to seek an aggravated upward sentencing departure because appellant's conduct constituted a major economic offense under the Minnesota Sentencing Guidelines. Minn. Sent. Guidelines 2.D.3.b.(4) (Supp. 2017).

At the plea hearing, appellant waived his right to a *Blakely* jury trial on the aggravating factors.[2] Appellant's counsel stated that appellant "will waive the right to have

[1] Appellant was also charged with two counts of second-degree burglary, one count of theft (over $500 up to $1,000), and two counts of stalking in multiple court files. The parties came to an agreement in April 2019 with respect to those pending charges against appellant, and appellant pleaded guilty to two counts of stalking and two counts of second-degree burglary. The facts of these cases are not relevant to the current appeal.

[2] "[A] *Blakely* trial considers whether aggravating sentencing factors exist. Any aggravating factors must be proven beyond a reasonable doubt." *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016) (discussing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004)).

a jury determine *Blakely* factors and ask that [the judge] determine that." Appellant acknowledged that was not "agreeing to the factors themselves but [was] waiving [his] right to have a jury make that determination and . . . agreeing to let the Judge make that determination on its own." Appellant signed and submitted a plea petition. The petition reflected that appellant would plead guilty to the identity-theft charge, respondent would dismiss the financial-transaction-card-fraud charge, and appellant would "waive Blakely jury." Per their agreement, both sides would argue disposition, respondent would seek an aggravated sentence, and the defense would "oppose aggravating factors."

Appellant admitted to the following facts. Appellant was the principal at Century Middle School in Lakeville. Appellant's ex-wife was employed at a middle school in a different school district. Appellant's ex-wife had issues with the assistant principal at the school, who is identified as victim 1. Upset by these issues, appellant hacked into victim 1's emails and accessed her personal information, including bank account numbers, her home address, and her usernames and passwords. Appellant also obtained emails, account numbers, usernames and passwords for victim 1's husband, who is identified as victim 2. Additionally, appellant acquired information belonging to victim 1's son and daughter, victims 3 and 4, including their school identification numbers, passwords, bank account numbers, PIN numbers, password reset information, and social security numbers.

Appellant also admitted that he had a copy of an application to the University of Minnesota graduate school, which contained the social security number, university identification number, and other personal information belonging to victim 5, who was

appellant's former employee. And appellant also obtained two checkbooks which had the name of victim 5 on them.

The next two victims, victims 6 and 7, were teachers at Century Middle School, the school where appellant was principal. Appellant admitted that he took photographs of victim 6's Visa credit card and University of Minnesota identification card at her desk in her classroom. Appellant also went into victim 7's classroom and took photographs of two credit cards belonging to victim 7.

Victims 8-12 are or were related to appellant. Victims 8 and 9 are appellant's brother and sister-in-law. Appellant had a "request for taxpayer identification number and certificate, in the name of victim number 8 in [his] notebook" and possessed victim 8's Edward Jones account numbers. Appellant also testified he obtained IRS paperwork and the social security number belonging to victim 9, victim 8's wife. And appellant took photographs of driver's licenses, credit cards, computer passwords, social security numbers, and other personal information belonging to victims 10 and 11,[3] who are appellant's former mother- and father-in-law.

Appellant had email addresses, username and log in information, password hints, license plate numbers, and cell phone numbers for victims 14 and 15. Victim 14 was a teacher in the school district where appellant once worked, and victim 15 is her husband. Appellant also possessed victim 15's U.S. Bank account numbers and username and

[3] Appellant did not admit to any facts with respect to victim 12, except that victim 12 is his former sister-in-law.

password for his Verizon accounts. Appellant admitted that he acquired information from victims 14 and 15 in either 2010 or 2011, and that it was "a long time ago."

Appellant acknowledged he did not have permission from the victims to possess their information. Appellant admitted that he tried to use the ill-gotten credit card numbers to make purchases and that he was involved in illegal activity by "getting checkbooks that don't belong to [him]." Finally, appellant admitted that he personally knows the first twelve victims. The district court accepted appellant's plea and scheduled the matter for sentencing.

At the sentencing hearing, the district court heard statements from several victims. Following the victim impact statements, the district court asked whether the parties had any "additions or corrections" about the contents of the presentence investigation (PSI). Neither party had additions or corrections to the PSI. Next, the district court asked the parties for their recommendations for sentencing. The prosecutor noted that there were "two motions before the court" and that she had spoken with appellant's counsel. The prosecutor proposed that it would "make[] sense for the [respondent] to argue [its] upward departure" and then have appellant's counsel respond and "argue his downward departure" after which, respondent would respond. Appellant's counsel did not object, and the district court approved the recommendation for how to proceed.

Respondent argued that appellant's offenses constituted a major economic offense, warranting a double upward departure. *See* Minn. Sent. Guidelines 2.D.3.b.(4). Respondent asserted that the aggravating factor was satisfied because it had proved beyond a reasonable doubt that more than two of the guideline circumstances were present.

Respondent contended that it had proved that the offenses involved multiple victims, the offenses involved a high degree of sophistication and planning, the acts occurred over a lengthy period of time, and appellant used a position of trust and confidence in the commission of the crime. During its argument, respondent referred to facts appellant admitted during his plea, information contained in the PSI, and other information in the record. Respondent requested that the district court sentence appellant to 162 months in prison. Appellant then responded to respondent's argument, asking the district court to deny respondent's motion for an upward departure, and arguing for a downward dispositional departure.

After considering the victim impact statements, arguments from the parties, and a statement from appellant, the district court denied appellant's motion for a downward dispositional departure and found that respondent proved beyond a reasonable doubt "the existence of an aggravating factor that supports the basis for departure." The district court correctly determined that respondent could not rely on multiple victims as a basis for departure because it was also an element of the offense. The district court determined that respondent "ha[d] proven beyond a reasonable doubt that there was a high degree of sophistication or planning in the identity theft case," and that appellant had used his "status or position to facilitate the commission of the crime." The district court also noted that the offense occurred over a lengthy period of time. The district court found that "[a] lot of the information that [appellant] did possess was held over a lengthy period of time. Some actions occurred in earlier years. Other actions occurred in later years."

As to whether appellant used his position or status in the commission of the offense,[4] the district court found that:

> [appellant's] position as a principal in a middle school was a position that he used not only when he was using technology to gain information on coworkers using the school system . . . .
>
> . . . And when he wasn't, the other victims, where he walked into the classrooms and gained their information, that's – he was using his position.
>
> . . . .
>
> With [appellant] as a principal, nobody's going to question him as to why he's there or what he's doing.

The district court imposed a sentence of 102 months' imprisonment, a "one and a half times departure from the middle of the box." This appeal follows.

D E C I S I O N

I. The district court did not violate appellant's right to a *Blakely* court trial.

Appellant contends that the district court violated his right to a *Blakely* court trial because even though he waived his right to a *Blakely* jury trial, he did not waive his right to a *Blakely* court trial or "his right to require [respondent] to prove facts supporting an upward departure beyond a reasonable doubt, to cross-examine respondent's witnesses, to present his own witnesses, or to remain silent or testify on his own behalf in trial."

[4] The district court rejected respondent's "argument of violation of trust as it relates to the family members," finding that it was not "a sufficient basis" to support an upward departure.

A *Blakely* trial is conducted to determine whether aggravating sentencing factors exist, and "[a] criminal defendant has the right to a trial by jury or by the court." *Sanchez-Sanchez*, 879 N.W.2d at 330. "[A]ny facts supporting a departure above the maximum guidelines sentences requires either a jury to find those facts beyond a reasonable doubt or the defendant to admit to those facts." *State v. Bradley*, 906 N.W.2d 856, 858 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018). A defendant may waive his rights to a *Blakely* jury trial, but

> [a]n 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.

State v. Dettman, 719 N.W.2d 644, 646 (Minn. 2006). Whether a *Blakely* error occurred presents a constitutional question that this court reviews de novo. *Id.* at 648-49. "*Blakely* errors are not structural and thus 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).

At the plea hearing, appellant agreed that he was waiving his right to have a jury determine whether aggravating factors exist and instead "giv[ing] that power to the Judge." Appellant also stated he was not "agreeing to the factors themselves." We recognize that when appellant stated that he wanted the judge, rather than a jury, to determine whether the aggravating factors existed, he did not explicitly waive his right to a court trial on that

issue. Even so, at the sentencing hearing, the parties and the district court went forward with an apparent understanding of how the hearing on the aggravating factors would proceed. Indeed, nothing in the record suggests that appellant expected a formal court trial as he did not object to the lack of formal court trial procedures or ask to call or cross examine any witnesses, testify, or present other evidence. Nor did appellant object to the district court's reliance on the exhibits included with respondent's motion.

Still, the parties and the court understood that respondent had an obligation to present evidence and prove the existence of an aggravating factor beyond a reasonable doubt and that the court would determine whether the burden had been met. Simply because appellant's counsel failed to challenge any of the evidence or put forth a substantive case does not mean that what occurred was not a court trial. How appellant and his counsel chose to proceed at sentencing does not determine the nature of the *Blakely* proceedings. Based on the procedural posture of this case, we conclude that the district court did not violate appellant's right to a *Blakely* trial.

Even if we agreed that the district court violated appellant's right to a *Blakely* trial, we still conclude that the district court's failure to conduct a formal court trial was harmless error. Based on our review of the record, the district court would have found respondent proved the aggravating factor of a major economic offense based on appellant's own admissions. Appellant pleaded guilty to identity theft and admitted many facts that the district court relied on when finding the existence of aggravating factors. Additionally, had there been a court trial, respondent would have presented other evidence, including the exhibits it submitted with its motion, to prove the existence of aggravating factors. For

instance, respondent would have offered, and the district court would have admitted into evidence, appellant's letters to his ex-wife in which he admitted his crimes and his motivations behind them. *See* Minn. R. Evid. 801(d)(2)(A) (providing that a statement is not hearsay if the statement is offered against a party and is the party's own statement). Because, as discussed below, the record supports the district court's imposition of an upward departure, we conclude that even if the district court erred when it failed to conduct a court trial on the aggravating factors, that error was harmless.

II. The record supports the district court's imposition of an upward departure because appellant committed a major economic offense.

Appellant argues that he is entitled to be resentenced under the presumptive guidelines sentence because the record does not support an upward departure. More specifically, appellant contends that respondent failed to prove the existence of an aggravating factor because appellant did not commit a "major economic offense." Committing a major economic offense is an aggravating factor under the Minnesota Sentencing Guidelines. And a major economic offense is "identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage." Minn. Sent. Guidelines 2.D.3.b.(4).

"A sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotations and citations omitted). "We review a district

court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). "A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *Id.*

A. To obtain money

First, appellant contends he did not commit a "major economic offense" because respondent failed to prove that appellant committed his crimes to obtain money.

But the record shows that appellant admitted that he possessed the bank account numbers and usernames and passwords for victim 1 through hacking into her computer. He also possessed screenshots of her bank accounts. Appellant acknowledged that because he had the screenshots of her bank accounts, he could have accessed those accounts "if [he] would have chosen to." Appellant also possessed usernames and passwords, bank account numbers, PIN numbers, password reset information, social security numbers, checkbooks, photographs of credit cards, taxpayer identification numbers, corporate identification numbers, Edward Jones account numbers, and IRS paperwork belonging to other victims. Appellant admitted that he attempted, although unsuccessfully, to make purchases using the victims' credit card numbers.

Appellant also wrote in a letter to his ex-wife that he had "taken pictures of various people's credit cards, including friends and family with the thought [he] could somehow use that information to obtain funds secretly." Appellant did this because he and his wife were "in financial ruin." And, in a journal entry, appellant listed all of the "bad things" he had done, including taking photos of other people's credit cards, hacking into people's

emails, and accessing various accounts. Appellant wrote that he did all of these things "for the money" because he "had spent the family down to nothing and had accumulated so much debt that [he] couldn't find a way out."

Additionally, the PSI contains information indicating that appellant committed the offenses to obtain money. Finally, before sentencing, appellant addressed the district court. Appellant explained that he collected "photos of people's credit cards, driver's licenses and other documents" because he "figured . . . that there must be a relatively harmless way to profit from credit cards, et cetera." The record amply supports the district court's finding that appellant committed his offenses to obtain money.

B. By other than physical means

Appellant next argues that the district court erroneously relied on appellant's physical acts of entering the classrooms of victims 6 and 7, removing their credit cards from their purses, and photographing the credit cards because in order "for these two victims to fall under the purview of the 'major economic offense' enhancement, [appellant] had to possess their information 'by other than physical means.'" The supreme court has held that theft by check and forgery are "nonphysical economic offenses," but receiving stolen property and shoplifting are not "nonphysical economic offense[s]." *State v. Carr*, 361 N.W.2d 397, 402 (Minn. 1985) (citing *State v. Gross*, 332 N.W.2d 167 (Minn. 1983)). Identity theft, as happened here, is more like theft by check and forgery than receiving stolen property or shoplifting. And appellant cites to no caselaw holding that identity theft does not qualify as a major economic offense, and we are unaware of any. For these reasons, we reject appellant's argument.

C. Aggravating subfactors

Finally, appellant contends that respondent failed to prove any of the required guidelines subfactors to support an aggravated departure. Respondent must prove two or more of the following circumstances to support an aggravating factor with respect to the major economic crime offense:

> (a) the offense involved multiple victims or multiple incidents per victim;
>
> (b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
>
> (c) the offense involved a high degree or sophistication or planning or occurred over a lengthy period of time;
>
> (d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or
>
> (e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

Minn. Sent. Guidelines 2.D.3.b.(4). The district court found that two of the subfactors were met. The district court found that subfactor (c) was met because the offense involved a high degree of sophistication or occurred over a long period of time, and that subfactor (d) was met because appellant used his position or status to facilitate the commission of the offense. Appellant appears to concede that subfactor (c) was met and therefore only challenges the district court's findings with respect to subfactor (d)—appellant's use of his position or status in the commission of the crime.

The district court found that "[appellant's] position as a principal in a middle school was a position that he used not only when he was using technology to gain information on

coworkers using the school system," but also when "he walked into the classrooms and gained their information." The record supports the district court's finding that appellant used his position as a school principal to gain information about his coworkers. The record shows that appellant was a principal at Century Middle School in Lakeville and that at least four of his victims were his employees or worked in the same district as appellant. Appellant targeted his victims as a result of his position and was able to facilitate the commission of his crimes and obtain personal information belonging to his victims because of his position.[5] Once again, the record amply supports the district court's findings. The district court did not abuse its discretion when it departed upward.

Affirmed.

[5] Appellant also contends that the district court erred in imposing an upward departure because in addition to the aggravating factors, the district court must also determine that his conduct was "significantly more serious" than that typically involved in identity-theft cases. But where aggravating factors exist, the district court may rely on those factors as reasons for departure. *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008) (citing Minn. Sent. Guidelines 2.D.2.(b)).