STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1393

State of Minnesota,
Respondent,

vs.

Donald Dean Hamm,
Appellant.

Filed September 22, 2009
Affirmed
Worke, Judge

Isanti County District Court
File No. 30-CR-07-218

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Jeffrey Edblad, Isanti County Attorney, Isanti County Courthouse, 555 18th Avenue SW, Cambridge, MN 55008 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

WORKE, Judge

Appellant challenges his convictions of two counts of second-degree assault with a dangerous weapon and terroristic threats, arguing that the district court (1) committed reversible error by refusing to give a voluntary-intoxication jury instruction, and (2) denied his right to a jury trial by finding that appellant used a firearm in committing the assaults and using this finding to enhance his sentences. We affirm.

FACTS

On February 10, 2007, appellant Donald Dean Hamm was at his brother-in-law, C.L.'s home. At approximately 4:30 p.m., R.K., C.L.'s friend, joined the men in the garage where they were drinking beer. Around 7:30 p.m., the men discussed appellant's desire to replace his bull that he kept on C.L.'s farm. R.K. offered to trade his registered bull for appellant's unregistered bull. Appellant did not seem to understand the offer, got angry, and left stating that he would return to shoot his bull.

Appellant arrived at his home, approximately 45 minutes away from C.L.'s home, where his son, A.H., noticed that appellant appeared angry. Appellant began searching for something and told A.H that he was looking for his guns because he was "going to slaughter people." A.H. called his mom and told her to go to C.L.'s home because she is the only one who can get appellant out of a "frantic rage." Appellant retrieved his guns and, along with A.H., drove back to C.L.'s home, stopping on the way to buy cigarettes.

Appellant loaded his shotgun as he approached C.L.'s gate and gave A.H. his cell phone, telling him that he might need it when appellant starts killing people. C.L. and

R.K. were outside when appellant returned waiting for officers to respond to a 911 call they placed after appellant left. C.L. approached appellant. Appellant pointed the gun at C.L. and told him that if he moved closer he would shoot. A.H. exited the vehicle and stood in front of his uncle. Appellant kept the gun pointed at A.H.'s knees.

At approximately 9:15 p.m., Deputy Nick Schafer arrived at C.L.'s home. Schafer made contact with appellant and ordered him to drop the shotgun several times. Appellant failed to comply, and the officer fired twice. Appellant "squared back up"—faced the officer directly, holding the shotgun with both hands. The officer fired again, striking appellant in the wrist. Appellant was charged with first-degree assault—deadly force against a peace officer; second-degree assault with a dangerous weapon against the officer; second-degree assault with a dangerous weapon against C.L.; and terroristic threats.

At the conclusion of the jury trial, the district court refused to give appellant's requested voluntary-intoxication jury instruction, finding that appellant failed to show that he was intoxicated. The jury found appellant not guilty of first-degree assault, but found him guilty of two counts of second-degree assault—dangerous weapon and terroristic threats. The district court sentenced appellant to two concurrent 36-month prison sentences. The sentences were enhanced based on the district court's finding that appellant used a firearm in committing the offenses. This appeal follows.

D E C I S I O N

Voluntary-Intoxication Instruction

Appellant argues that the district court abused its discretion by refusing to give a voluntary-intoxication jury instruction. The district court's refusal to give a requested jury instruction is reviewed under an abuse-of-discretion standard. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). We focus on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

Minnesota law provides that

> An 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.

Minn. Stat. § 609.075 (2006). In order for the district court to give a voluntary-intoxication jury instruction "(1) the defendant must be charged with a specific-intent crime; (2) there must be . . . a preponderance of the evidence [showing] 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).

Appellant was charged with a specific-intent crime. The state argues, however, that appellant failed to establish the other two criteria. Appellant is only entitled to an instruction on voluntary intoxication if there is evidentiary support for it. *See id.* (stating that a voluntary-intoxication jury instruction is appropriate if the evidence shows the defendant's intoxication); *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977) ("It is

beyond dispute that a party is entitled to an instruction on his theory of the case if there is evidence to support it."). "[C]onsumption of intoxicants does not create a presumption of intoxication and the possibility of intoxication does not create the presumption that a defendant is thereby rendered incapable of intending to do a certain act." *Torres*, 632 N.W.2d at 617. The defendant bears the burden of showing by a fair preponderance of the evidence that he was too intoxicated to form intent. *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

The district court concluded that "if [appellant] had any alcohol in his system at all it was slight." The evidence shows that appellant drank approximately six beers within a four-hour period. R.K. testified that appellant seemed to be acting normally and did not seem intoxicated. A.H. testified that appellant was probably drunk because when he is drunk "he usually looks for stuff . . . mostly the TV remote." An investigator from the Bureau of Criminal Apprehension (BCA) testified that appellant told him that he consumed six or seven beers that day and that he was intoxicated. The investigator also interviewed C.L. who stated that all three men were "feeling the effects" of alcohol. The investigator further testified, however, that appellant recalled getting into a heated argument regarding trading a bull, that he was going to shoot the bull and butcher it for meat, that he had gone to his residence and picked up a shotgun and brought it back to C.L.'s along with his son, and that he stopped at a gas station on his way to C.L.'s to buy cigarettes. There was no toxicology report and the evidence merely shows that appellant consumed alcohol and may have felt the effects of alcohol, but not that he was too

intoxicated to form intent. Therefore, appellant failed to establish by a preponderance of the evidence that he was intoxicated.

Appellant also failed to offer intoxication as a reason for his actions. Appellant asserts that he met this burden because his behavior, which was erratic and unreasonable, was that of an intoxicated person, and he was unable to remember events from that evening and was unaware of what he was doing. Appellant did not testify; thus, he did not explain that he behaved in a certain way because he was intoxicated. The testimony from A.H. that he knew his father was drunk because he was searching for items does not explain the assaults as being induced by intoxication. A.H. also testified that he called his mother because she is the only one who can get his father out of a "frantic rage." But A.H. did not testify that appellant gets into frantic rages when he is drunk. Thus, it seems that the record supports a conclusion that appellant's behavior that night was based on anger and not intoxication. And the other evidence, in the form of C.L.'s statement that appellant was feeling the effects of alcohol, does not explain the assaults as caused by appellant's intoxication. Further, the BCA investigator testified that appellant recalled events from that night, which demonstrates that appellant was able to remember what happened that evening. Appellant failed to offer intoxication as a reason for his actions; therefore, the district court did not abuse its discretion by refusing to give the voluntary-intoxication jury instruction.

Sentences

Appellant also argues that the district court violated his right to a jury trial. Appellant contends that his Sixth Amendment rights under *Blakely v. Washington*, 542

U.S. 296, 124 S. Ct. 2531 (2004), were violated when the district court imposed two 36-month sentences, under Minn. Stat. § 609.11, subd. 5 (2006), without a jury finding that a firearm was used in the commission of the assaults. Whether a *Blakely* error occurred is a legal question, which we review de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006).

The jury was asked to find whether appellant assaulted the officer and C.L. using a "dangerous weapon." The district court also defined "dangerous weapon" to include a firearm. The district court stated, "A firearm, whether loaded or unloaded, or even temporarily inoperable is a dangerous weapon." But the jury was not asked to find whether a "firearm" was used to commit the assaults. Without a jury finding that appellant used a firearm in the assaults, there was a *Blakely* violation. *See State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005). Because *Blakely* errors are not structural, however, they are subject to a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). "An error is [] harmless if there is [no] reasonable doubt the result would have been [the same] if the error had not occurred." *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006).

Appellant argues that the error was not harmless because it increased his sentences. But we can determine with certainty that the jury would have found that appellant used a firearm because the evidence that appellant possessed a firearm during the commission of the assaults was overwhelming and unchallenged. Further, the jury found appellant guilty of assault with a dangerous weapon and there is no reason to believe that the jury thought any weapon other than the firearm was used. We conclude

that the district court's *Blakely* error was harmless because there was no evidence that any weapon other than the firearm was used to commit the assaults.

Affirmed.