STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0329

State of Minnesota,
Respondent,

vs.

Dionna Susan Koller,
Appellant.

Filed October 9, 2017
Affirmed
Bratvold, Judge

Dakota County District Court
File No. 19HA-CR-15-1600

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

James Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Chief Deputy County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant challenges the sentence imposed following her guilty plea to attempted aggravated second-degree robbery, arguing that the district court violated her Sixth

Amendment right to a jury trial when it imposed a 36-month mandatory minimum sentence for firearm use without a jury finding or appropriate waivers. We conclude that the district court's error was harmless beyond a reasonable doubt; thus, we affirm.

FACTS

Appellant Dionna Susan Koller met S.F.S. at a truck stop in South Saint Paul, Minnesota, where the pair agreed that Koller would trade sexual favors for money. After their first encounter, they exchanged phone numbers. A few days later, S.F.S. called Koller and arranged a time to "hang out." According to Koller, the meeting was for prostitution.

S.F.S. picked Koller up and they went to a park near a river. After they walked down the riverbank and sat on a rock, Koller's boyfriend approached them, pointed a handgun at S.F.S., and demanded money. S.F.S. refused, grabbed the gun, and a struggle ensued. During the struggle, the gun discharged, and a bullet almost hit Koller in the head. S.F.S. got on top of Koller's boyfriend, who yelled at Koller to help him. Koller pulled on S.F.S. to free her boyfriend. Koller and her boyfriend then fled, meeting an unknown third party in a nearby parking lot and driving away in his car. The state charged Koller with attempted aggravated second-degree robbery in violation of Minn. Stat. § 609.245, subd. 2 (2014), with reference to Minn. Stat. §§ 609.101, .05, .11, subd. 5, and .17 (2014).

Koller waived her right to a jury trial and pleaded guilty to the charge, with no agreement on sentencing. The hearing transcript establishes that Koller planned to argue for a downward departure and the state gave notice it would argue for an executed 36-month sentence under Minn. Stat. § 609.11, subd. 5(a), based on firearm use. The district court accepted Koller's plea.

At the plea hearing, Koller testified that her boyfriend told her to meet S.F.S., and that her boyfriend had her cell phone, which he used to find her. Koller admitted that she knew there was a "possibility that trouble was coming," but denied knowing that her boyfriend planned to rob S.F.S. until he "showed up with the gun" and demanded money. While Koller denied using a rock or hitting S.F.S. in the head, she admitted that she tried to pull S.F.S. off of her boyfriend to prevent S.F.S. from hurting her boyfriend.

At the sentencing hearing, the district court stated that it could not "ignore the fact that we had a gun involved." The district court imposed the mandatory-minimum sentence of 36 months under Minn. Stat. § 609.11, subd. 5(a). Koller appeals, asking for a modified sentence.

D E C I S I O N

"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." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); *State v. Hagen*, 690 N.W.2d 155, 158 (Minn. App. 2004). The statutory maximum a court may impose for a crime is "the maximum sentence [allowed] . . . solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004). Whether a *Blakely* error has occurred is a legal question which this court reviews de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006).

Any person convicted of an enumerated offense in which they, or an accomplice, "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." Minn. Stat. § 609.11, subd. 5(a). Aggravated robbery is an enumerated offense subject to an enhanced sentence under the statute. Minn. Stat. § 609.11, subd. 9. The imposition of an enhanced sentence under Minn. Stat. § 609.11, subd. 5(a), based on judicial determination that a defendant used a firearm during the commission of the offense, violates a defendant's right to a jury trial. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005) (reversing imposition of enhanced sentence based on judicial finding after trial court had denied appellant's request for jury determination of firearm use).

Koller contends that a *Blakely* error occurred. We agree. Koller pleaded guilty to the attempted aggravated second-degree robbery charge, but she did not waive her right to a jury finding on use of a firearm during the robbery. *See Dettman*, 719 N.W.2d at 646, 654 (holding separate waiver is required under *Blakely* before upward sentence departure based on aggravating factors). Moreover, the state concedes that the district court erred when it imposed the 36-month sentence without obtaining a separate waiver.

Next, we must determine whether the error was harmless beyond a reasonable doubt. *See State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006) (applying harmless error test to *Blakely* violation). A *Blakely* error is harmless if a 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.

Koller contends that the error was not harmless and she is entitled to have her sentence modified to the presumptive guidelines sentence. Koller is correct that applicable

case law requires that a defendant must expressly waive her right to a jury trial on fact-finding related to aggravating factors before a district court may use plea hearing testimony to enhance her sentence. *Dettman*, 719 N.W.2d at 650-51. But, here, no new fact-finding is required, which distinguishes Koller's case from the *Dettman* decision.[1] *Id.* at 654-55 (remanding for resentencing on aggravating factors because plea hearing "statements used to support Dettman's enhanced sentence were not admissions to essential elements of the offenses to which Dettman pleaded guilty").

In Koller's case, the sentencing enhancement is proven by Koller's admission to an element of the offense. In fact, Koller, in response to questioning about whether she knowingly assisted her boyfriend, volunteered that her boyfriend "showed up with the gun" and that a bullet just missed her head. Thus, it is undisputed that Koller's boyfriend used a gun during the robbery and that the gun was discharged. Moreover, Koller entered a straight plea, with the express understanding that the state would seek the 36 month mandatory minimum sentence for firearm use.

Koller also argues that the error was not harmless because the factual basis for her plea was inadequate to establish that she was an accomplice to the robbery. This issue is not properly raised in this appeal because Koller does not challenge the validity of her plea, but instead seeks a modified sentence. We agree with the state that Koller has waived adequacy of the factual basis for the plea.

[1] Koller's request for relief is also different from that requested in *Dettman*. Instead of seeking a jury determination of firearm use, Koller asks this court to modify her sentence to impose the presumptive guidelines sentence, a stayed sentence of one year and one day.

Even if we consider the adequacy of Koller's guilty plea, her argument fails. Intent to aid and abet a crime may be inferred from many factors, including a defendant's (1) presence at the crime scene, (2) proximity to the principal before and after the crime, (3) lack of objection, and (4) flight from the crime scene with the principal. *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006). "If the accused plays at least some knowing role in the commission of the crime and takes no steps to thwart its completion, a conviction as an aider may be upheld." *State v. McBroom*, 394 N.W.2d 806, 811 (Minn. App. 1986), *review denied* (Minn. Jan. 16, 1987).

Here, Koller testified that she met S.F.S. at the demand of her boyfriend, knowing that her boyfriend had her cell phone and would follow her. Koller admitted that she did not attempt to stop the robbery and, in fact, assisted her boyfriend after he showed up with a gun because S.F.S. appeared to have gained the upper hand. Koller also fled the scene with her boyfriend. The record establishes an adequate factual basis to support Koller's plea for aiding and abetting attempted aggravated second-degree robbery.

Because the record evidence is undisputed that a firearm was used in the attempted commission of a robbery, we can "say with certainty" that a jury would have concluded that Koller's accomplice used a gun during the commission of the robbery, had the issue been submitted to a jury. *See Dettman*, 719 N.W.2d at 655. Thus, any error by the district court was harmless.

Affirmed.