STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0521

State of Minnesota,
Respondent,

vs.

Marquell Deon Johnson,
Appellant.

Filed June 21, 2021
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Hennepin County District Court
File No. 27-CR-19-19966

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Kirk, Judge.[*]

NONPRECEDENTIAL OPINION

REYES, Judge

Following convictions of drive-by shooting, unlawful possession of a firearm, and second-degree assault, appellant argues that (1) insufficient evidence supports his

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

convictions and (2) the district court erred when it imposed an upward departure because he did not waive his *Blakely* right to a jury finding of the factual basis for the departure. We affirm his conviction but reverse on the *Blakely* issue and remand for resentencing.

FACTS

Around 6:30 a.m. on August 12, 2019, M.T. was leaving for work from her home, the lower unit of a duplex which she shared with her five-year-old daughter J.H., her two sons, her mother, and her boyfriend. M.T.'s home is on a street with "rarely any traffic" when she leaves for work. As M.T. sat in her parked car on the street in front of her home, she noticed a black car approaching her from the opposite direction. The black car slowed before stopping ten feet away from M.T.'s car, at which point M.T. made eye contact with the driver. M.T. recognized the driver as someone she had seen going in and out of the upper unit of the duplex. Among others, two brothers, N.K. and D.P., lived in the upper unit at the time. Believing that the driver of the black car may have been simply looking to park, M.T. began driving down the road to a nearby gas station. But as M.T. drove away, she saw through her rear-view mirror that the black car had backed up 30 to 40 feet next to a charcoal van. M.T. thought this was odd but continued driving to the gas station, just two to three minutes away.

When M.T. stepped out of her car at the gas station, she heard gunshots from the direction of her home. M.T. immediately thought the black car was involved in the gun shots. M.T. then went into the store to pay for gas before receiving a call from her mother. M.T.'s mother told her that J.H. had been shot or possibly that glass had gone in her foot.

M.T. drove back to her home, finding J.H. bleeding and bullet holes in J.H.'s wall, which faces an alley.

Officers arrived at M.T.'s home just after her. At the home, M.T. told one officer that she saw the driver of the black car, a man with dreads, just moments before the shooting. While riding in the ambulance with J.H. and another officer, M.T. learned from her boyfriend that the black car was no longer in sight. The officer asked if M.T. could find a photo from Facebook of the person she saw in the black car and she found one on D.P.'s Facebook profile. The profile tagged in D.P.'s photo belonged to appellant Marquell Deon Johnson. J.H. was then treated at the hospital for a gunshot wound to her foot.

M.T. later spoke with D.P., telling him that she was "100 percent sure" appellant shot at the house. D.P. then messaged appellant several times on Facebook Messenger. D.P. and appellant spoke over a Facebook Messenger call. During the call, D.P. asked why appellant shot up the house, to which appellant replied that he did not know what D.P. was talking about and started laughing.

Officers later searched appellant's Facebook account, finding several photos of appellant posing with a black semi-automatic handgun. On August 13, 2019, officers interviewed appellant, recording the interview. In the interview, appellant changed his story constantly; at first denied knowing anyone on M.T.'s block; denied being near M.T.'s home during the shooting; pretended he knew nothing of the shooting despite his call with D.P.; and denied ever having a firearm despite the photos on his Facebook profile. When confronted about the Facebook photos showing him with firearms, he claimed the photos were old and suggested the images were altered. He refused to provide alibi names but

said he would if it was "that [] serious." Appellant also provided inconsistent alibi information that changed each time the officers provided new information, at times claiming he woke up in his car and other times claiming he was in a house without disclosing the address or other residents at the house.

Respondent State of Minnesota charged appellant with drive-by shooting under Minn. Stat. § 609.66, subd. 1e(b) (2018) (count 1), unlawful possession of a firearm under Minn. Stat.§ 624.713, subd. 1(2) (2018) (count 2), and second-degree assault under Minn. Stat. § 609.222, subd. 2 (2018) (count 3) in an amended complaint.

Appellant waived his right to a jury trial, and the parties stipulated that appellant is ineligible to possess firearms. At trial, the state presented video-surveillance footage from two nearby houses that show a black car in the front of the house before the shots and leaving the alley after the shots. Several officers testified and presented their body-worn camera footage. The state also presented "Shotspotter" information[1] showing seven gunshots fired in three seconds from the alley, consistent with the photos of the gun casings found in M.T.'s backyard. And although appellant did not testify, the state presented his three-hour interview from August 13, 2019. The district court found appellant not credible.

D.P., M.T., M.T.'s boyfriend, and M.T.'s neighbor also testified. M.T. identified appellant as the person she saw in the black car. D.P. also told investigators that appellant had been jumped at the gas station a week earlier and that no one came to aid and assist him when he called. M.T.'s next-door neighbor testified that, when he heard the gunshots

[1] One officer testified that Shotspotter provides information about the location and number of gun shots fired.

coming from the backyard, he looked outside his window and saw a black car driving quickly in the alley. M.T.'s neighbor acknowledged that the trees block certain areas of his view from the alley, but that he saw no other vehicle or person in the alley for the minute he was looking out the window.

The district court found appellant guilty of all charges. After the state submitted *Blakely* factors, the district court found an aggravating factor because appellant committed the act in the presence of a child. The district court first imposed a 60-month sentence on count 2 and then a 120-month concurrent sentence on count 1, which represents an upward durational departure based on the aggravating factor. This appeal follows.

DECISION

I. Sufficient evidence supports the district court's finding that appellant committed the crimes beyond a reasonable doubt.

Appellant argues that the evidence is insufficient to support the convictions. We are not persuaded.

To review the sufficiency of the evidence, we undertake "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the [factfinder] believed the State's witnesses and disbelieved any evidence to the contrary." *Id*. "[W]e will not disturb the verdict if the [factfinder], acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Id*. We apply the same standard of review in bench trials

as in jury trials for insufficiency-of-the-evidence claims. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

When, as here, a conviction is based on circumstantial evidence, we conduct a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). First, we identify the circumstances proved at trial, disregarding evidence that is inconsistent with the finding of guilt. *Id.* Second, we "independently consider the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole." *Id.* We do not defer to the factfinder's choice among reasonable inferences at this second step. *Id.* The evidence is sufficient if the circumstances proved, viewed as a whole, are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* We will not reassess the factfinder's credibility determinations on appeal. *Id.*

The circumstances that implicate appellant include: (1) around 6:30 a.m., M.T. observed a black car in front of the home; (2) the driver of the car did not park on the street but instead slowed down and put his car in reverse for about 30 to 40 feet; (3) M.T. positively identified appellant as the driver of the black car; (4) approximately 90 seconds after M.T. left, her neighbor heard several gun shots fired at M.T.'s home from the alley; (5) right after hearing the gunshots, M.T.'s neighbor looked out the window and saw a black sedan moving quickly through the alley and no other vehicles or people in the alley; (6) video surveillance shows the black car in front of the house as well as a similar black car traveling south in the alley; (7) no other cars or people were seen in the alley following the shooting; (8) the Shotspotter information showed a quick succession of seven gunshots,

consistent with a semi-automatic gun; (9) appellant's Facebook profile displayed several photos of him holding a semi-automatic gun; (10) appellant laughed when D.P. asked him about the shooting three hours after the shooting; (11) appellant's answers were inconsistent on nearly every relevant question when the police officers interviewed him the day after the shooting; (12) officers recovered seven discharged casings near the garage in M.T.'s backyard between her building and her neighbor's building, 15 to 20 feet from the alley; and (13) there were seven holes in M.T.'s wall facing the alley, consistent with bullet holes. We conclude that the circumstances proved support the guilty verdict.

Under the second step, appellant argues primarily that the evidence is insufficient because the state presented no evidence linking him to a firearm on August 12, the officers never found the black car, and appellant does not own a black car. But we limit our review to the subset of circumstances proved and do not consider what the state could have offered. Appellant relies on the video-surveillance footage of the alley to suggest that two black cars "may have been in the alley" on August 12. But this hypothesis is not reasonable in light of the circumstances proved. M.T.'s next-door neighbor did not see another car or even another person in the alley immediately after the shooting. No one did. The state explains that the video-surveillance time stamps were inaccurate and that the officers had to approximate the time: "the timestamp was *approximately* 1 hour and 17 minutes slow." Based on these approximations, we agree with the district court that "[i]t is not reasonable to believe that an identical vehicle appeared in the alley 90 seconds later."

Based on the circumstances proved, we conclude that the only reasonable inference is that of guilt and that the circumstances proved are sufficient to support the convictions.

II. The district court erred by imposing an upward durational departure when appellant did not waive his *Blakely* right to a jury finding on the factual basis for the departure.

Appellant argues that the district court erred by imposing an upward durational departure when he did not waive his right to a jury finding of the factual basis for the departure. We agree.

"A criminal defendant has the right to a trial by jury or by the court." *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016). And this right extends to a *Blakely* trial to determine whether aggravating sentencing factors exist. *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2431 (2004). "[A]ny facts supporting a departure above the maximum guideline 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 right to a *Blakely* jury trial but must do so through "[a]n express, knowing, voluntary, and intelligent waiver" before the district court may use aggravating factors to enhance the sentence. *State v. Dettman*, 719 N.W.2d 644, 646 (Minn. 2006). Whether a *Blakely* error occurred is a constitutional question that we review 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).

The state concedes that appellant did not waive his *Blakely* rights and that it is not a harmless error. The parties agree that the matter must be reversed and remanded on this issue, but they disagree about the instructions on remand. Without citation to legal authority directly on point, appellant argues that on remand the district court can resentence only on the conviction impermissibly based on an aggravating factor in violation of *Blakely*: count 1.

But as this court has stated before, the sentencing of multiple convictions is a "package" which the district court considers as a whole to arrive at a fair and just sentence. *State v. Hutchins*, 856 N.W.2d 281, 284-85 (Minn. App. 2014), *review granted* (Minn. Dec. 30, 2014) *and order granting review vacated*, 866 N.W.2d 905 (Minn. July, 20 2015). On appeal, "the sentencing package doctrine reflects that when a defendant attacks a portion of a judgment, he is reopening the entire judgment and cannot selectively craft the manner in which the court corrects that judgment." *Id*. at 285 (quotation omitted).

Here, appellant is attempting to narrow the scope on remand to "selectively craft the manner" in which the district court corrects the judgment. Because we must afford the district court discretion to correct the error and arrive at an appropriate sentence, we reverse and remand with instructions to the district court to resentence appellant on all counts, resentence on just count 1, empanel a sentencing jury to resentence on count 1, or allow appellant to waive his *Blakely* right to a jury finding on the aggravating factor for count 1.

Affirmed in part, reversed in part, and remanded.