STATE OF MINNESOTA
IN COURT OF APPEALS
A11-194

State of Minnesota,
Respondent,

vs.

Corey Dell Andrews,
Appellant.

Filed February 13, 2012
Affirmed in part and remanded
Halbrooks, Judge

Stearns County District Court
File No. 73-CR-09-9131

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

HALBROOKS, Judge

Appellant challenges his sentences of first-degree burglary and simple robbery, both of which were upward durational departures from the Minnesota Sentencing

Guidelines. He argues that the district court departed without first obtaining a valid waiver of his right to a jury determination of the existence of facts supporting the departures, and by basing the departures, in part, on a fact that is an element of uncharged criminal conduct. Because the district court's failure to obtain a valid waiver was harmless, we affirm in part. But because the district court relied on an improper fact and because it is not clear whether the district court would have imposed the same sentence, absent that reliance, we remand for resentencing.

FACTS

Appellant Corey Andrews and his brother, Eric Andrews, broke into S.B.'s house in the middle of the night, wearing masks, to look for a kilogram of cocaine that they believed S.B. was storing for her cousin. They woke her and her nine-month-old son, whom she was sleeping with, covered her mouth and face with their hands, and bound her arms and legs with duct tape. The brothers then rifled through her home while S.B.'s 5-year-old daughter and 10-year-old sister slept in the adjacent room. Eventually the brothers left, stealing the keys to one of S.B.'s two vehicles, her wallet, and her two cellular phones. They left her a kitchen knife to break free from the duct tape.

The brothers were charged with multiple crimes, including robbery, burglary, and assault. Eric Andrews pleaded guilty and was sentenced. Appellant waived his right to a jury trial. After the bench trial, the district court convicted him of first-degree burglary, simple robbery, false imprisonment, and fifth-degree assault.

Before sentencing, the district court heard arguments about whether additional facts had been proved at trial that would permit an upward departure from the Minnesota

Sentencing Guidelines. After the arguments, the district court found the presence of two aggravating facts: the presence of a child and the invasion of the victim's zone of privacy. The district court sentenced appellant, who had a criminal-history score of 3, to concurrent sentences of 150 months for first-degree burglary (a 57-month upward durational departure); 66 months for simple robbery (a 27-month upward durational departure); and 17 months for false imprisonment. This appeal follows.

D E C I S I O N

Appellant challenges his sentences for first-degree burglary and simple robbery, contending that they constitute improper upward departures from the sentencing guidelines. We review the district court's decision to depart from the sentencing guidelines under an abuse-of-discretion standard. *State v. Jackson*, 749 N.W.2d 353, 357-58 (Minn. 2008).

I.

We first address appellant's argument that the district court erred by basing its departures on facts that it found without obtaining a valid waiver of his right to a sentencing jury under *Blakely*. *See Blakely v. Washington*, 542 U.S. 296, 302-04, 124 S. Ct. 2531, 2536-37 (2004) (holding that the Sixth Amendment requires that any fact that increases the penalty for a crime beyond what the district court could impose without making additional findings must be submitted to a jury). The right to a sentencing jury may be waived if the defendant makes the waiver "personally, in writing or on the record in open court, after being advised by the court of the right to a trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd.

1(2)(b); *see also* Minn. Stat. § 244.10, subd. 7 (2010) (permitting the district court to make findings that would allow for an upward departure only after the defendant waives his right to sentencing jury).

A.

Appellant argues that there was no *Blakely* waiver. The state contends that when appellant waived his right to a jury to determine guilt, he was also waiving his right to a sentencing jury. We therefore address whether his conduct during his jury-trial waiver constituted a valid *Blakely* waiver. We review this question de novo. *State v. Dettman*, 719 N.W.2d 644, 651-52 (Minn. 2006) (applying de novo review to purported *Blakely* waiver).

To be valid, a *Blakely* waiver must be made "expressly, knowingly, voluntarily, and intelligently." *Dettman*, 719 N.W.2d at 650. These requirements mirror the requirements for waiver of a jury trial on the issue of guilt. *See id.* But even though both waivers require the same essential elements, a waiver of a jury trial on the issue of guilt cannot be interpreted as an automatic *Blakely* waiver. *Id.* at 654.

The following exchange constitutes the purported *Blakely* waiver:

> THE COURT: Good morning. . . . I was also just advised that there may be a waiver of right to jury trial, and have the issue of *guilt* submitted to the Court per court trial. Is that correct [defense attorney]?
>
> DEFENSE ATTORNEY: It is, Your Honor. I just verified that. Again, . . . we have met with [appellant] yesterday for probably a couple of hours and spent a lot of time talking about this. He thought on it overnight, and this morning and told us that it was—he preferred to waive his right to a jury and have a Bench trial and I confirmed it again.

THE COURT: Okay. Well, I'll confirm with [appellant] as well. [Appellant], you understand on this matter, *not just on the issue of whether or not you're guilty of the offenses, but also whether or not the Court should give a greater sentence if you were to be found guilty*. You have the right to a trial by a jury. You understand that?

APPELLANT: Yes, sir.

THE COURT: And basically what that means is *on the trial that's set for Tuesday*, we'd call in a number of people, and there would a [sic] selection process where they'd be questioned, and both parties would have an opportunity to eliminate some for no reason at all. And ultimately we'd end up with probably 12 jurors and an alternate. And they would hear the evidence, and the 12 jurors would be instructed as to what the law is. The alternate would not deliberate unless I had to excuse somebody because of an illness or some other event. But then *they would consider whether or not you would be guilty of any or all of the Counts*—the Counts, and they would make *that* decision based upon instructions the Court would give them, based upon the evidence they heard, based upon argument of counsel, and on the burden of proof being on the State to prove *guilt* beyond a reasonable doubt. Do you understand you have that right, correct?

APPELLANT: Yes, sir.

THE COURT: Now, your other option is to have the Court hear the evidence, apply the same law, same burden of proof, and decide whether or not the prosecution has met that burden of proof. And I guess that's what you're requesting. You'd rather have a judge hear the evidence, and that would be me, and make a decision rather than jurors; is that correct?

APPELLANT: Yes, sir.

THE COURT: Okay. And the other thing I want to point out is with regard to that jury of 12, they'd have to reach a unanimous verdict. So if it's, you know, ten think you're *guilty* and two think you're *not guilty*, that could result in a hung jury, where we'd have to start over again. With a Judge,

> it's obviously just one person. So it's—don't have to worry about getting a unanimous verdict. Whatever I would decide basically would be the decision; you understand that?
>
> APPELLANT: Yes, sir.
>
> THE COURT: Now, you've had a chance to talk, I think, to [defense attorney] about this probably, [and your other defense attorney] as well as far as this decision is concerned, correct?
>
> APPELLANT: Yes, sir.
>
> THE COURT: And I don't want to go into what they talked to you about, what's—you know, why they think you should or shouldn't do anything, that's privileged. That's between the two of you. But do you feel comfortable as to having enough time to talk to them about this?
>
> APPELLANT: Yes, sir.
>
> . . . .
>
> THE COURT: Okay. And based upon all that, as we sit here today, what you want is that—to have the Judge hear the evidence and make *a decision* on this matter, correct?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You're giving up your right to have a jury trial. You're not admitting you're *guilty*. You're not pleading *guilty*. You're not waiving your right to trial, but you want a court trial, correct?
>
> APPELLANT: Yes, sir.

(Emphasis added.)

Although the district court refers to appellant's right to a sentencing jury to determine the existence of aggravating facts, that reference is insufficient for us to conclude that appellant intended to waive both jury-trial rights. The conversation

between appellant and the district court, which repeatedly refers to "guilt," encompasses only appellant's jury-trial right on the issue of guilt. Beyond acknowledging the existence of his right to a sentencing jury, appellant makes no acknowledgement that he wished to relinquish that right. Minn. R. Crim. P. 26.01, subd. 1(2)(b) requires that a defendant confirm his intention to waive his right to a jury trial on the issue of an aggravated sentence. Because no such confirmation exists here, appellant's purported waiver is invalid.

B.

Even if an upward sentencing departure is determined to violate *Blakely*, this court does not need to reverse for resentencing if the error is harmless. *Dettman*, 719 N.W.2d at 655. An error is harmless if this 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*." *Id.* Here, the two aggravating factors found by the district court—the presence of a child and the fact that the crimes occurred in a place where the victim had a reasonable expectation of privacy (her home)—were undisputed at trial. We can say with certainty that a jury viewing this record would have found those aggravating facts if they had been submitted. Therefore, even though there was a *Blakely* violation, the error was harmless, and resentencing is not required on that ground.

II.

We next address appellant's argument that he is entitled to resentencing because the district court abused its discretion by relying on an improper aggravating factor. It is

an abuse of discretion for the district court to base an upward departure on an improper factor. *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). We review de novo whether a particular basis for departure is proper. *Id.*

Appellant argues that the district court cannot properly rely on the fact that he invaded the victim's zone of privacy to enhance his sentence. A fact that is an element of the charged crime cannot be used to enhance a defendant's sentence. *State v. Edwards*, 774 N.W.2d 596, 602 (Minn. 2009). Further, a fact that is an element of an uncharged crime cannot be used to enhance a sentence. *Weaver*, 796 N.W.2d at 570 (citing *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008)).[1] Under these rules, for example, an individual charged only with second-degree assault (with a dangerous weapon) cannot receive an upward departure on the ground that he had a dangerous weapon because that is an element of the charged offense; nor can he receive an upward departure on the ground that he inflicted substantial bodily harm because second-degree assault (with infliction of substantial bodily harm) is a separate, uncharged crime under the assault statute, and the infliction of harm is an element of that crime. *See State v. Simon*, 520 N.W.2d 393, 394 (Minn. 1994). These rules are designed to prevent the state from circumventing the sentencing guidelines by the way in which a crime is charged. *Id.*

Applying these rules, the invasion of S.B.'s zone of privacy was an improper fact to support an upward departure because the fact that the crime occurred in S.B.'s home is

[1] An exception applies to uncharged conduct for which the legislature has authorized cumulative punishment, which includes firearm offenses, arson, and fleeing a police officer. Minn. Stat. § 609.035, subds. 3-5 (2010); *Weaver*, 796 N.W.2d at 570. The uncharged conduct here does not fit that exception.

an element of the uncharged offense of first-degree burglary in a dwelling. *See Jackson*, 749 N.W.2d at 358 (holding that zone of privacy could not enhance robbery sentence because dwelling is an element of uncharged burglary offense).

First-degree burglary occurs when a person "enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building" and either (a) the building is a dwelling; (b) the person possesses a dangerous weapon; or (c) the person assaults someone in the building. Minn. Stat. § 609.582, subd. 1 (2010). The state charged appellant under parts b and c of the statute (dangerous weapon and assault) and chose not to charge him under part a (dwelling). The state cannot now use the fact that the crime occurred in a dwelling to enhance, and nearly double, appellant's sentences.

The district court also found that the incident took place in the presence of a child. Appellant does not contest the use of that fact to support an upward departure. But appellant claims that the sentence imposed by the district court based on that fact alone would unfairly exaggerate the criminality of his conduct. Whether a sentence would have been imposed in the absence of a fact improperly relied on, in part, to support a departure is not always an appropriate analysis for this court to undertake post-*Blakely*. *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) ("After *Blakely*, we no longer independently review the record for evidence to justify a departure because the issue of whether additional facts exist to support the departure is a question of fact . . . . Instead, when the facts found only support an improper or inadequate reason for departure, we have generally remanded for further proceedings.").

When a district court relies on both proper and improper aggravating facts, we must determine whether it is necessary to remand the case to the district court for resentencing. *See id.* at 828-29 (deciding not to remand); *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010) (deciding to remand). In making that decision, "we must determine whether the district court would have imposed the same sentence absent reliance upon the improper aggravating factor." *Stanke*, 794 N.W.2d at 828. "In doing so, we consider the weight given to the invalid factor and whether any remaining factors found by the court independently justify the departure." *Id.* "Only if we conclude that the district court would have imposed the same sentence absent the improper aggravating factor will we affirm the sentence imposed by the court." *Id.*

Here, it is not clear whether the district court would have imposed the same sentences, considering the presence-of-a-child fact alone. Although we know from statements made by the district court that, of the two aggravating facts it found, it believed the presence-of-a-child fact to be more significant, we cannot tell how much more significant. The district court's order states generally that "those factors" justify the sentences. Because we cannot say with certainty that appellant would have received the same sentence without consideration of the improper fact, we remand to the district court for resentencing.

Affirmed in part and remanded.