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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-30**

State of Minnesota,  
Respondent,

vs.

Oscar Adrian Orozco,  
Appellant.

**Filed January 17, 2012  
Affirmed  
Stoneburner, Judge**

Washington County District Court  
File No. 82CR10613

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

Peter Orput, Washington County Attorney, Karin L. McCarthy, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellant challenges the sentence imposed for his conviction of second-degree assault, asserting that (1) the district court erred in imposing a mandatory minimum

sentence under Minn. Stat. § 609.11 without a jury determination of supporting facts and (2) the district court erred by adopting the parties' stipulation that the assault was more egregious than the typical second-degree assault without articulating supporting facts. Because any error in imposing the mandatory minimum sentence was harmless and because appellant stipulated, based on facts in the record, that the assault and injuries he caused were more egregious than a typical second-degree assault, constituting an aggravating factor, we affirm.

### FACTS

While serving a 220-month sentence for felony murder, appellant Oscar Orozco assaulted another inmate with a handmade weapon, causing lacerations to the victim's face that required 54 stitches. Orozco was initially charged with first-degree assault, and an amended complaint added a charge of third-degree assault. Orozco then entered into a plea agreement which provided that Orozco would enter an *Alford* plea to second-degree assault and the third-degree assault charge would be dismissed. The parties also agreed to an upward departure capped at 54 months with the prosecutor arguing for 54 months and Orozco arguing for a sentence less than the 54-month cap.

At the plea hearing, Orozco waived his right to a *Blakely* trial and stipulated that the offense he committed and the injuries he caused were more egregious than a typical second-degree assault and that this egregiousness constituted an aggravating factor.

At the sentencing hearing, the district court noted the stipulation and found that the offense was "more egregious than the typical second degree assault, in that sufficient reason exists to depart upward." The Pre-Sentence Investigation report (PSI) stated that

the presumptive sentence “is the mandatory-minimum sentence of 36 months for a ‘subsequent weapon’ offense.” Sentencing proceeded based on the unchallenged assumption that the presumptive sentence was 36 months. But use of a dangerous weapon or firearm was not an element of Orozco’s felony-murder conviction, no document in the district court file establishes his use of a dangerous weapon in commission of that offense; Orozco did not admit use of a dangerous weapon or firearm in the prior offense during the plea or sentencing for the assault charge; and Orozco did not waive his right to a jury determination that he used a dangerous weapon or firearm in the first offense.

The district court sentenced Orozco to 42 months based on the egregiousness of the assault as an aggravating factor. In this appeal, Orozco argues that the district court erred by assuming a presumptive sentence of 36 months without a jury finding (or waiver of a jury finding) on facts supporting imposition of the mandatory-minimum sentence for a subsequent weapon offense and erred by departing upward for the egregiousness of the offense without specifically articulating facts supporting the finding of egregiousness.

## **D E C I S I O N**

We review a decision to depart from the sentencing guidelines for clear abuse of discretion. *State v. Johnson*, 689 N.W.2d 247, 253 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). The entitlement to a jury determination of factors supporting an upward departure (*Blakely* issue) “presents a constitutional issue, which this court reviews de novo.” *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004).

**I. Error in assuming the presumptive sentence was 36 months was harmless.**

Minn. Stat. § 609.11, subd. 4 (2010), provides a mandatory-minimum sentence for conviction of enumerated “second or subsequent” offenses, including second-degree assault, committed with a dangerous weapon. Minn. Stat. § 609.11, subd. 8 (b) (2010), requires the district court to impose the mandatory sentence if the defendant “used or possessed a firearm or other dangerous weapon” in the prior offense.<sup>1</sup> Here, use of a dangerous weapon was an element of the second-degree assault that Orozco pleaded guilty to, but was not an element of his prior felony-murder conviction. Although Orozco waived his right to a jury determination of facts supporting an upward departure based on the egregiousness of the offense, he did not waive a jury determination of facts underlying the imposition of the mandatory-minimum sentence.

Under these facts, Orozco was entitled to a jury determination that his prior offense was committed with a dangerous weapon or firearm before the mandatory minimum sentence could be imposed for his conviction of second-degree assault. *See State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005) (holding the applicable version of Minn. Stat. § 609.11 unconstitutional “to the extent that it authorizes the district court to make an upward durational departure upon finding a sentencing factor without the aid of a jury or admission by the defendant.”).

The district court erred by imposing the mandatory minimum sentence, but *Blakely* errors are subject to a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20,

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<sup>1</sup> In this appeal, Orozco does not assert that the mandatory minimum sentence provided in the cited statute cannot apply to his crimes: he challenges only the procedure by which it was determined that the mandatory minimum does apply.

30 (Minn. 2006) (noting that the United States Supreme Court, in *Washington v. Recuenco*, 548 U.S. 212, 222 126 S. Ct. 2546, 2553 (2006), determined that *Blakely* errors are not structural and therefore are subject to a harmless error analysis). “An error is harmless beyond a reasonable doubt if ‘the verdict was surely unattributable to the error.’” *Chauvin*, 723 N.W.2d at 30–31.

Orozco argues that, because application of the mandatory minimum sentence increased the presumptive sentence from 27 months to 36 months, the error cannot be harmless, relying on cases in which a *Blakely* violation increased the possible sentence and therefore was held to be necessarily prejudicial and not harmless. But Orozco stipulated to an upward departure based on an admitted aggravating factor, with a cap of 54 months, which represents a double departure from the 27-month sentence that Orozco argues should have been the presumptive sentence. Under these circumstances, Orozco cannot establish that the erroneous assumption about the presumptive sentence had any effect on the sentence imposed or increased the possible sentence.

Orozco also argues that this court should not engage in “speculation” about what a sentencing jury would have found had the issue of his use of a dangerous weapon or firearm in committing felony murder been presented to such a jury. But the United States Supreme Court rejected a similar argument in *Washington v. Recuenco*, 548 U.S. at 221, 126 S. Ct. at 2552, finding unpersuasive the argument that applying the harmless-error analysis in a case in which an element of the crime was not submitted to the jury would “hypothesize a guilty verdict that [was] never in fact rendered”. A harmless-error analysis necessarily involves a determination of what a jury would have found had an

omitted issue been presented. *See State v. Dettman*, 719 N.W.2d 644, 655 (Minn. 2006) (concluding that because an erroneous sentencing departure “increased the length of Dettman’s sentence by 72 months *and because we cannot say with certainty that a jury would have found the aggravating factors used to enhance Dettman’s sentence had those factors been submitted to a jury in compliance with Blakely*, we conclude that the *Blakely* error was not harmless.”) (emphasis added).

Orozco’s sentencing for second-degree assault apparently proceeded on the erroneous assumption that use of a dangerous weapon or firearm was an element of Orozco’s prior conviction, obviating a jury determination of that issue for sentencing in this case. *See Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2533, 2536 (2004) (citing the rule expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) that facts increasing the penalty for a crime, “[o]ther than the fact of a prior conviction” must be submitted to a jury). Orozco does not deny that his prior offense was committed with a firearm, as alleged by the state, or a dangerous weapon, as asserted in the PSI. Orozco does not dispute that use of a firearm in the prior offense is referenced in Department of Correction documents and does not suggest that there is no evidence of use of a firearm in the record of his prior conviction. Therefore, we conclude that, had the issue been presented to a sentencing jury, the jury would have been unable to reach any conclusion other than that the prior offense was committed with a firearm or dangerous weapon, rendering the error harmless beyond a reasonable doubt.

Orozco asserts that the error affected the validity of his plea, citing *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998), for the proposition that a criminal defendant is

entitled to be informed of the maximum sentence that can be imposed before entering a valid plea. But Orozco stipulated to the maximum sentence that could be imposed in this case, and we find this argument to be without merit. Orozco has not established that he is entitled to any relief for the *Blakely* error.

**II. The record supports upward departure based on stipulation that egregiousness of offense constituted an aggravating factor supporting departure.**

Orozco also challenges the district court’s imposition of an upward departure by adopting the reasons provided by the parties for their stipulation that an aggravating factor existed based on the egregiousness of the offense and resulting injuries. Orozco cites *State v. Rourke*, 773 N.W.2d 913, 919–20 (Minn. 2009), for the proposition that providing a reason unsupported by facts cannot support an upward departure. And Orozco argues that the facts asserted by the state supporting the stipulation that the assault was more egregious than the usual second-degree assault with a dangerous weapon inflicting substantial bodily harm—use of a sharpened weapon made by Orozco in the prison, the length of the assault, and the seriousness of the injuries—are elements of the crime and cannot be used to aggravate the sentence. Because Orozco stipulated that the nature of the offense and injuries inflicted were more egregious than the usual second-degree assault and constituted an aggravating factor supporting departure, we conclude that he has waived the right to argue that these factors were elements of the crime charged. Implicit in the stipulation is Orozco’s admission that the injuries inflicted constituted more than “substantial bodily harm,” which is defined as “injury which involves a temporary but substantial disfigurement, or which causes a temporary but

substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” Minn. Stat. § 609.02, subd. 7a (2010).

If a district court departs from a presumptive sentence, it must “disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.” Minn. Sent. Guidelines IID (2010). The Minnesota Rules of Criminal Procedure also require the district court to make findings of fact supporting the departure. Minn. R. Crim. P. 27.03, subd. 4(C) (2010). The district court acknowledged this obligation at the plea hearing, stating “that even when the parties agree to an upward departure, the [c]ourt still must consider what factors justify that departure,” whereupon the prosecutor stated that “the factor we are agreeing upon is [that] this is more egregious than a normal Second Degree Assault and the extent of injury,” and, after consulting with Orozco, defense counsel stated “Yes, we can stipulate to that fact.” The district court then asked if Orozco was agreeing that a *Blakely* jury could find that these factors exist, and defense counsel responded, “Yes, Your Honor.”

At the sentencing hearing, the prosecutor argued for departure up to the agreed-on cap of 54 months, noting that the offense was originally charged as a first-degree assault but, by agreement, was amended to a lesser charge with the state arguing that the offense was more egregious than a normal second-degree assault, based on the planning that went into fashioning the weapon, the length of the assault, and the extent of lacerations to the



victim's face that required 54 stitches.<sup>2</sup> Defense counsel conceded that the victim's injuries were significant but argued for a departure of less than 54 months, based on the fact that Orozco had already been punished by being placed in segregation for two years. In pronouncing the sentence, the district court stated that at the plea hearing it was "agreed . . . as part of the plea and waiver . . . [that] the court could depart upward in this case and it was agreed, and I find, that the offense was more egregious than the typical second degree assault, in that sufficient reason exists to depart upward, so I will be departing upward [in] this case." On this record, we conclude that the district court's language implicitly found the aggravating factors listed by the prosecutor and complied with the requirement to make a record of the factors supporting the departure.

### **III. Orozco's pro se brief does not advance any additional arguments.**

Orozco submitted a pro se supplemental brief, arguing only that he agrees with and supports defense counsel's argument that at least two significant sentencing errors require a remand. We have fully addressed those arguments.

**Affirmed.**

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<sup>2</sup> The presumptive sentence for first-degree assault in this case would have been 98 months.