STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0991

State of Minnesota,
Respondent,

vs.

Sandford McColley,
Appellant.

Filed September 1, 2009
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-CR-07-2164

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

Melanie Ford, St. Louis County Attorney, James T. Nephew, Assistant County Attorney, St. Louis County Courthouse, 100 North 5th Avenue West, Duluth, MN 55802 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Special Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

In this sentencing appeal, appellant argues that the district court erred in sentencing him under the August 1, 2006 version of the Minnesota Sentencing Guidelines without a jury determination as to the date of the offense. Because this error was harmless beyond a reasonable doubt, we affirm.

FACTS

In April 2007, appellant Sandford McColley was charged with three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct for allegedly engaging in sexual penetration and sexual contact with his granddaughter, A.L.M., during 2006. The same complaint charged McColley with two counts of second-degree criminal sexual conduct for allegedly engaging in sexual contact with another granddaughter, S.A.M., during this same time period. A jury found McColley guilty on all four counts involving A.L.M., but acquitted him of the charges involving S.A.M.

Because the four counts on which McColley was found guilty involved the same course of conduct, the district court sentenced McColley only on one count of first-degree criminal sexual conduct, which involved multiple acts of sexual penetration against A.L.M. committed over an extended period of time. New sentencing guidelines, that prescribed longer sentences for sex offenses, took effect on August 1, 2006. The district court applied the new guidelines because "[t]he testimony at trial described a lengthy series of sexual contact/conduct/offenses against the victim which did extend into and

ultimately culminate in the late fall or early winter of 2006, well past the effective date of the new Guidelines." Accordingly, the district court sentenced McColley to 173 months' imprisonment, the maximum permitted under the new guidelines. This appeal follows.

D E C I S I O N

Under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), a jury must determine any fact issue, such as the date of the offense, that bears on the determination of which presumptive sentence applies. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006). The right to have a jury determine the date of the offense may not be waived through a defendant's failure to request such a determination. *Id.* at 903-04 (citing *State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006)). But we review the failure to obtain a jury determination regarding the date of the offense under a harmless-error standard. *Id.* at 904; *see also State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006) (stating "that *Blakely* errors are not structural and thus are subject to a harmless error analysis"). An error is harmless if there is no reasonable doubt that the result would have been the same if the error had not occurred. *DeRosier*, 719 N.W.2d at 904; *cf. State v. Dettman*, 719 N.W.2d 644, 655 (Minn. 2006) (finding *Blakely* error not harmless because it substantially increased sentence length and because "we cannot say with certainty that a jury would have found the aggravating factors used to enhance [the] sentence had those factors been submitted to a jury in compliance with *Blakely*").

Here, the district court found that at least part of the conduct for which the jury convicted McColley occurred after the August 1, 2006 effective date. This is the type of judicial fact-finding deemed a *Blakely* violation in *DeRosier*, and the state concedes that

the district court erred in applying the August 1, 2006 sentencing guidelines without a jury determination as to the timing of the offense.

McColley argues that this error was prejudicial because it substantially increased his sentence from the pre-August 1, 2006 presumptive sentence of 144 months to the 173-month sentence he received. But the state asserts that the error was harmless because the evidence only supports a finding that the offense occurred on or after August 1, 2006. We agree.

At trial, A.L.M. testified that McColley touched her "lots of times" and described multiple acts of sexual contact and penetration, in various locations, over a period of several months. A.L.M. stated that the sexual acts happened when she was eight years old; A.L.M. turned eight in late-July 2006. She also testified that it was hard to remember specific times, but she explained that "one of the first times" was an incident that took place in McColley's truck.

The jury also viewed a videotape of A.L.M.'s pretrial interview with Sergeant Marlene Hall of the St. Louis County Sheriff's Department, in which A.L.M. told Hall that she did not "remember the month or the date" when the sexual contact began. However, A.L.M. told Hall that it first happened in McColley's truck, and she repeatedly referenced her aunt, uncle, and cousin's August 2006 vacation and October 2006 move to Connecticut as reference points for explaining when the sexual contact began.[1]

[1] Other witnesses confirmed that A.L.M.'s aunt, uncle, and cousin lived across the street from McColley, went on vacation to Connecticut in early August 2006, and moved to Connecticut in October 2006. These dates are not disputed.

A.L.M.'s mother also pointed to August 2006 as the likely starting point of the sexual contact. She testified that her children began spending more time at their grandparents' house that month. She further testified that she believed that appellant's criminal acts began in August 2006, "[b]ecause the kids told [her] that [their uncle and aunt] weren't around" at the time the sexual contact started.

By contrast, there is virtually no evidence reasonably indicating that the entire course of sexual contact occurred prior to August 2006. Our extensive review of the record[2] reveals that during her interview with Hall, A.L.M. said that the incident in McColley's truck occurred when she was seven years old, which would have been before her 8th birthday in late July 2006. A.L.M. also described an incident of sexual contact in which McColley had asked her and S.A.M. to come sit on his lap, told them he wanted to tell them something, and then said, "April Fool's Day," after they sat down. But the jury apparently discounted this testimony by acquitting McColley of the charges regarding S.A.M. And the references to A.L.M. being seven years old were brief, accounting for less than one-half of one page of the trial transcript. Moreover, both parties' closing arguments described the alleged contact as occurring between August 2006 and mid-December 2006. Viewing the record as a whole, the limited comments A.L.M. made during her pretrial interview almost certainly would not lead a jury to believe that the offense was completed before August 2006.

[2] McColley does not identify any evidence that would have permitted the jury to find that the offense occurred prior to August 2006.

Based on our thorough review of the record, we conclude that there is no reasonable doubt that the jury, if asked, would have found that McColley committed at least part of the offense on or after August 1, 2006. Because the overwhelming weight of the evidence indicates that the entire course of criminal conduct occurred after the effective date of the new sentencing guidelines, the district court's error in failing to submit the timing question to the jury was harmless.

Affirmed.