

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1612**

State of Minnesota,
Respondent,

vs.

Arnanza Lamontez Cork, Jr.,
Appellant.

**Filed August 19, 2019
Reversed and remanded
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-17-16638

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

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Tracy M. Smith, Presiding Judge; Schellhas, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his sentence for unlawful possession of a firearm, arguing that the district court erred in concluding that it did not have discretion to depart from the mandatory minimum sentence. We reverse and remand.

FACTS

In July 2017, police officers stopped a vehicle driven by appellant Arnanza Cork, Jr., in Bloomington. During the stop, Cork told the officers that he was carrying a gun, and officers recovered a gun from him. Respondent State of Minnesota charged Cork with being a prohibited person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016), because Cork had a prior conviction of aggravated robbery.

Before trial, the prosecutor told the district court that “[t]his is a true mandatory case, the so-called mandatory mandatory. [Cork] has a prior conviction, an [extended jurisdiction juvenile (EJJ)] conviction, where he personally used a firearm during an aggravated robbery, so that triggers the mandatory 60-month commit.” Cork did not stipulate that he possessed a firearm during the commission of aggravated robbery; he stipulated that he “was prohibited from possessing a firearm under Minnesota law.”

At the end of the first day of trial, the state asked Cork, “Do you understand when you stipulated to this prior adjudicated conviction that we’ve been referring to that makes you prohibited is one for an EJJ disposition for felony aggravated robbery[?]” To which Cork replied, “Yes.” The state offered no evidence at trial that Cork possessed a firearm during the commission of the aggravated robbery.

The jury found Cork guilty. Before sentencing, Cork moved for a downward dispositional departure. The state opposed Cork's motion and reiterated its position that this is a "true mandatory prison sentence" case. The district court stated:

I agree with [defense counsel] that if I could depart, there's absolutely grounds for that. But I have to apply the law. That's my job. And the way I read the law is that I don't have any discretion here. I read the law as saying that I have to; so to the extent that I'm wrong on that, the court of appeals can tell me that if – that there is discretion to sentence you to something less than the 60 months. And if the case would come back to me, I'd very seriously consider those arguments. I just don't see the law as allowing any discretion in this case.

The court sentenced Cork to 60 months' imprisonment.

This appeal follows.

DECISION

This court reviews a district court's decision not to depart from the sentencing guidelines for an abuse of discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A district court abuses its discretion when its decision is premised on legal errors or its decision is unsupported by the record. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). We review questions of law de novo. *State v. Barker*, 705 N.W.2d 768, 771 (Minn. 2005).

The jury found Cork guilty of being a prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2). The state sought a mandatory minimum sentence of 60 months' imprisonment based on its contention that Cork's prior conviction of aggravated robbery involved possession of a firearm. Cork argues that the district court erred in its reliance on a factor not presented to the jury—whether Cork used or possessed a firearm during the commission of his prior offense of aggravated robbery—in

determining that it lacked discretion to grant a dispositional departure from a mandatory minimum sentence of 60 months' imprisonment. We agree.

A defendant convicted of being a prohibited person in possession of a firearm is subject to a mandatory minimum sentence and “shall be committed to the commissioner of corrections for not less than five years.” Minn. Stat. § 609.11, subd. 5(b) (2016). Generally, a district court has the discretion to depart from this mandatory minimum sentence if substantial and compelling reasons support departure. Minn. Stat. § 609.11, subd. 8(a) (2016); *see also State v. Olson*, 325 N.W.2d 13, 17–19 (Minn. 1982) (granting district courts authority to depart from mandatory minimum sentences but recognizing that legislature may further restrict judicial discretion). But a district court does not have the discretion to depart from the mandatory minimum sentence if the defendant has committed a prior crime, such as aggravated robbery, in which the defendant “used or possessed a firearm or other dangerous weapon.” Minn. Stat. § 609.11, subds. 8(b), 9 (2016) (listing crimes to which mandatory minimum sentences apply).

Upon the state's request for a mandatory minimum sentence under section 609.11, a district court “shall allow the state to prove beyond a reasonable doubt to a jury . . . the factors in support of the state's request.” Minn. Stat. § 244.10, subd. 5(a) (2016). Whether a defendant, at the time of the commission of an offense to which a mandatory minimum sentence applies, used or had possession of a firearm “shall be determined by the fact finder at the time of a verdict or finding of guilt at trial or the entry of a plea of guilty based upon the record of the trial or the plea of guilty.” Minn. Stat. § 609.11, subd. 7 (2016). “[T]he decision to apply the mandatory minimum sentence, like a decision to depart from the

guideline presumptive sentence, requires judicial fact-finding.” *Barker*, 705 N.W.2d at 773.

The elements of aggravated robbery do not include that a defendant be armed with a firearm in the commission of this crime. Minn. Stat. § 609.245 (2016). Instead, section 609.245, subdivision 1, provides, “[w]hoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery.” By stipulating only to the existence of his prior aggravated-robbery conviction, Cork did not stipulate to using or possessing a firearm in the commission of the offense. The only discussion of the facts underlying Cork’s aggravated-robbery conviction consisted of statements made by the prosecutor and defense counsel to the court outside the presence of the jury. Any mention by an attorney about Cork’s use or possession of a firearm during the commission of aggravated robbery does not support a factual finding. The district court properly instructed the jury that statements made by an attorney are not considered evidence. *See 10 Minnesota Practice CRIMJIG 3.11* (2018) (“[T]he arguments or other remarks of an attorney are not evidence.”).

Here, the state offered no evidence, and the record is void of any evidence, of Cork’s use or possession of a firearm during the commission of the aggravated-robbery offense. Even if the jury had been given a special interrogatory regarding Cork’s use or possession of a firearm during commission of the aggravated-robbery offense, the jury had no evidence upon which to base a finding that Cork used or possessed a firearm during the commission of the offense. In the absence of Cork’s stipulation or judicial fact-finding of

the use or possession by Cork of a firearm in the commission of the aggravated-robbery offense, Cork's sentence for his conviction of prohibited person in possession of a firearm does not fall under Minn. Stat. § 609.11, subds. 8(b), 9. *See State v. Crockson*, 854 N.W.2d 247, 249 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014) (determining that resentencing was necessary because district court sentenced defendant to mandatory minimum when state did not prove the necessary factors to warrant such sentence). The district court therefore erred by determining that it lacked discretion to sentence Cork without regard to the mandatory minimum 60-month sentence under Minn. Stat. § 609.11 (2016).

Because the district court premised its denial of Cork's dispositional departure motion on a legal error, we reverse and remand for resentencing and imposition of a sentence that excludes consideration of Cork's use or possession of a firearm during the commission of the aggravated-robbery offense. *See id.* (reversing and remanding for imposition of sentence that excluded the mandatory minimum). But, on remand, to depart from the mandatory minimum sentence, the court must find substantial and compelling reasons to do so. *See State v. Mayl*, 836 N.W.2d 368, 371 (Minn. App. 2013) (“[I]f an offender is subject to a mandatory minimum sentence, the district court may still sentence a defendant ‘without regard to the mandatory minimum . . . if the court finds substantial and compelling reasons to do so.’” (quoting Minn. Stat. § 609.11, subd. 8(a)), *review denied* (Minn. Nov. 12, 2013).

Reversed and remanded.