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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1034**

State of Minnesota,
Respondent,

vs.

Phuc Trong Nguyen,
Appellant.

**Filed May 18, 2020
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-18-21369

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

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Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

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

SEGAL, Chief Judge

In this direct appeal from final judgments of conviction and sentences for 13 counts of possession of a firearm by an ineligible person, appellant argues that the district court

abused its discretion by sentencing him to an upward durational departure and erred by imposing multiple sentences. We affirm in part, reverse in part, and remand.

FACTS

On August 22, 2018, law enforcement executed a search warrant at a storage unit owned by appellant Phuc Trong Nguyen after receiving information that he may be in possession of firearms and ammunition. Nguyen is ineligible to possess firearms and ammunition due to his prior conviction of a crime of violence. Law enforcement seized 3 rifles, 11 handguns, at least 60 high-capacity magazines, 10 regular-capacity magazines, several hundred rounds of ammunition, various firearm accessories and materials used to build firearms. On August 24, respondent State of Minnesota charged Nguyen with 13 counts of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2018). The state later filed a notice of intent to seek an upward durational sentencing departure.

Nguyen pleaded guilty to all 13 counts of possession of a firearm by an ineligible person and waived his right under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to a jury trial to determine whether aggravating factors existed for an upward sentencing departure. Nguyen's plea was pursuant to an agreement that his sentence would be between 60 and 180 months. The district court held a bench trial to determine whether aggravating factors existed to support an upward durational departure. In its findings of fact and conclusions of law regarding the aggravating factors, the district court determined that Nguyen's criminal history and the fact that he was a danger to public safety constituted aggravating factors that justified an upward durational departure.

At the sentencing hearing, the state argued that the severity of the offense warranted sentences of 120 months on each count in light of the amount and nature of the weaponry and ammunition found in Nguyen's possession, the fact that Nguyen was on supervised release for a prior conviction of being an ineligible person in possession of a firearm at the time the weapons were discovered, and the length and frequency of his criminal history. Defense counsel argued that mitigating factors warranted concurrent 60-month sentences on counts 1-10 with consecutive 60-month probationary sentences on counts 11-13. The district court ultimately sentenced Nguyen to 108 months in prison on all 13 counts, to be served concurrently. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in granting an upward durational departure.

Nguyen challenges the upward durational departure, arguing that the record does not support the district court's determination. We review departures from the sentencing guidelines for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Where aggravating factors are present that provide a "substantial and compelling reason not to impose a guideline sentence," a district court has the discretion to depart from the sentencing guidelines. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). The imposition of an upward durational departure will be affirmed so long as the district court's reasons for departing are "legally permissible and factually supported in the record." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) (quotation omitted).

A district court may impose an upward departure when sentencing an offender for a violent felony if (1) that “offender has two or more prior convictions for violent crimes”¹ and (2) “the fact-finder determines that the offender is a danger to public safety.” Minn. Stat. § 609.1095, subd. 2 (2018). The fact-finder may base its determination that the offender is a danger to public safety on either of two factors. *Id.*, subd. 2(2). The first factor is the criminal history of the offender, including the frequency of criminal activity and length of involvement. *Id.*, subd. 2(2)(i). The second factor is the presence of an “aggravating factor that would justify a durational departure.” *Id.*, subd. 2(2)(ii). Here, the district court found that both factors were present and supported the determination that Nguyen is a danger to public safety. Nguyen challenges the district court’s findings on each factor.

Criminal History

Turning first to the criminal-history factor, the district court determined that Nguyen’s criminal history consisted of the following convictions: first-degree criminal sexual conduct (convicted 1995), theft of a motor vehicle (convicted 2013), and possession of a firearm by an ineligible person (convicted 2016).² First-degree criminal sexual conduct and possession of a firearm by an ineligible person are violent crimes under Minn. Stat. § 609.1095, subd. 1(d) (2018). The district court made the following finding:

¹ Nguyen does not dispute that he has two prior convictions for violent crimes.

² Nguyen was also convicted of fifth-degree controlled-substance crime in 2011. The district court received a certified copy of this conviction into evidence, but did not make a factual finding regarding the conviction or reference it in the order determining that Nguyen is a danger to public safety.

11. Since defendant has a felony record dating back to 1995 when he was convicted of Criminal Sexual Conduct in the First Degree, his past demonstrates long involvement in criminal activity. While defendant was not the most prolific criminal, his recent purchases of many firearms and ammunition and possession of them while still on supervised release for a weapons offense shows that, at least of late, he is engaged in criminal activity at a high frequency.

The district court determined that, with this criminal history, Nguyen posed a danger to public safety.

Nguyen argues that his criminal history does not support the district court's determination because there are mitigating factors surrounding his prior convictions that make them less serious. Nguyen points to the fact that he received only probation for his criminal-sexual-conduct conviction and argues this was because the victim was an "underage willing participant" who was physically "larger and more mature than he was." Nguyen also emphasizes that he never violated the terms of his probation resulting from that conviction and has never been charged with a similar offense. With regard to his conviction for theft of a motor vehicle, Nguyen notes that he co-owned the car and further points out that his drug-possession conviction was a low-level offense. Even though Nguyen describes his criminal history as "nonviolent" and "benign," he has prior felony convictions spanning from 1995 to 2016, two of which qualify as crimes of violence under Minn. Stat. § 609.1095, subd. 1(d). Additionally, Nguyen was on supervised release for a violent felony conviction at the time he was charged with the present offenses.

Moreover, the record reflects that the district court carefully considered Nguyen's criminal history and his arguments. The district court observed that Nguyen was "not the

most prolific criminal,” but that his recent behavior of stockpiling weapons and ammunition while on supervised release for a weapons offense established that, as of late, he was engaged in criminal activity at a high frequency. The district court further noted that his felony record dating back to 1995 demonstrated “long involvement in criminal activity.” Thus, the district court weighed the relevant factors under Minn. Stat. § 609.1095, subd. 2(2)(i), and the record supports the district court’s determination that Nguyen’s criminal history established that he is a danger to public safety. Because the reason provided by the district court for imposing an upward departure is “legally permissible and factually supported in the record,” the district court did not abuse its discretion by concluding that the departure was warranted based on his criminal history. *Hicks*, 864 N.W.2d at 156.

Aggravating Factor

As an independent second ground justifying a durational departure, the district court found the existence of an aggravating factor—that this offense was significantly more serious than the typical offense. Pursuant to Minn. Stat. § 609.1095, subd. 2(2)(ii), the fact-finder “may base its determination that the offender is a danger to public safety . . . on the fact that the present offense of conviction involved an aggravating factor that would justify a durational departure.” “[A]n aggravating factor is conduct that renders the sentenced offense significantly more serious than typically involved in the commission of the sentenced offense.” *State v. Fleming*, 883 N.W.2d 790, 797 (Minn. 2016). When such conduct is found, the district court may impose an aggravated sentence. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

Here, the district court made the following finding:

10. The defendant's stockpiling of many firearms, including high-caliber guns, assault-style rifles and high-capacity magazines, despite his felony convictions, makes defendant dangerous and a significant threat to public safety and makes each count more serious than a typical offense of Possession of a Firearm or Ammunition by a Person Convicted of a Crime of Violence.

Nguyen argues that the district court abused its discretion because it improperly considered the number of weapons he possessed. Because he was separately charged and convicted for the possession of each firearm, he claims that this, in essence, amounts to double counting. But in *Fleming*, the supreme court explained that a district court may "base an upward sentencing departure on *any* aggravating factor, even if the aggravating factor relates, or arises in connection with another offense committed during the same course of conduct." 883 N.W.2d at 797.

The district court was not engaged in any double counting here. The district court's findings make clear that the determination of seriousness was not based simply on the number of weapons. Rather, the findings reflect the court's concern that Nguyen possessed not just weapons, but that he had an "arsenal" of military-grade weapons, including high-caliber guns and assault-style rifles, along with 60 high-capacity magazines and thousands of rounds of ammunition to arm those weapons. It is also important to note that Nguyen was not charged for possession of the ammunition, even though it was unlawful for him to possess it. It is appropriate under *Fleming* to consider the nature of the weaponry and the ammunition as an aggravating factor. *Id.* We conclude that the district court did not abuse its discretion in determining that Nguyen's conduct was significantly more serious than the

typical offense. The nature of the weapons Nguyen possessed and the amount of ammunition to arm those weapons renders his offense significantly more serious than the typical possession of a firearm case. We, thus, affirm the upward durational departure on both grounds—Nguyen’s criminal history and the aggravating factor.

II. The district court erred by imposing multiple sentences.

Nguyen next challenges the imposition of multiple sentences arguing that the offenses all arose out of the same behavioral incident.³ Pursuant to Minn. Stat. § 609.035, subd. 1 (2018), “if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” The statute prohibits multiple sentences, including concurrent ones, for offenses that were committed as part of a single behavioral incident. *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012). But, as argued by the state, there are statutory exceptions to that prohibition. See Minn. Stat. § 609.035, subds. 3-6 (2018).

The determination of whether multiple offenses were committed as part of a single behavioral incident requires factual determinations that will not be reversed unless clearly erroneous. *State v. O’Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). When the facts are not in dispute, the determination of whether multiple offenses are part of a single behavioral incident presents a question of law that is reviewed de novo. *Ferguson*, 808 N.W.2d at 590.

³ Nguyen did not object to the imposition of multiple sentences at his sentencing hearing. But the prohibition against multiple sentences arising out of the same behavioral incident cannot be waived. *State v. Johnson*, 653 N.W.2d 646, 650-51 (Minn. App. 2002).

Firearms Exceptions

The state's first line of argument is that the multiple sentences were proper under the firearms exception to the single-behavioral-incident rule. Under the firearms exception:

[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. . . .

. . . .

. . . [A] prosecution for or conviction of a violation of section 609.165 or 624.713, subdivision 1, clause (2), is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct.

Minn. Stat. § 609.035, subds. 1, 3. Nguyen was convicted of 13 counts of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2018). The state argues that each count is an "other crime" that Nguyen may be sentenced for under the firearms exception.

The resolution of this issue turns on the phrase "any other crime" in Minn. Stat. § 609.035, subd. 3. This phrase has not been interpreted in the context of the firearms exception to the single-behavioral-incident rule, but it has been interpreted in the context of the burglary exception. *See State v. Holmes*, 778 N.W.2d 336, 340-41 (Minn. 2010) (interpreting Minn. Stat. § 609.585 (2008)). In *Holmes*, the question before the supreme court was whether the defendant was properly sentenced for his convictions of aiding and abetting first-degree burglary with assault and aiding and abetting third-degree assault. *Id.* at 338. The supreme court observed that "Minnesota law generally prohibits a person from

being punished twice for conduct that is part of the same behavioral incident, with certain exceptions.” *Id.* at 339.

Under Minn. Stat. § 609.585 (2018), “a prosecution or conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered.” In *Holmes*, the supreme court determined:

We read the statute to allow a conviction of another crime committed in the same course of conduct as the burglary, provided that the statutory elements of that crime are different than the crime of burglary. The phrase “any other crime” means a crime that requires proof of different statutory elements than the crime of burglary.

Id. at 341. The supreme court held that, because the statutory elements of the crimes for which Holmes was convicted were not identical, Holmes could be convicted of and sentenced for both crimes. *Id.*

The *Holmes* case, however, involves a different scenario from the present case. While it is true that the state was required to show that Nguyen possessed 13 different firearms to obtain 13 convictions, the question under *Holmes* was whether the offenses for which he was convicted contain different statutory elements. In *Holmes*, this determination was made by comparing the elements based on the language of the statutes under which Holmes was convicted. *Id.* Here, the statutory elements for each conviction were identical—the state was required to show that Nguyen was ineligible to possess a firearm, and that he possessed a firearm. Minn. Stat. § 624.713, subd. 1(2). The specific firearms were not part of the statutory elements of the offense. We therefore conclude that the

firearms exception does not apply because the offenses are not “any other crime” under Minn. Stat. § 609.035, subd. 3.

Single Behavioral Incident

The state argues that, even if the firearms exception is not applicable, the multiple sentences were still proper because the offenses were not committed during a single behavioral incident. Whether offenses were committed during a single behavioral incident depends on whether the conduct shares a unity of time and place and “was motivated by an effort to obtain a single criminal objective.” *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). Here, the firearms were discovered by law enforcement at the same time and in the same location. The state argues, however, that this fact does not end the inquiry when the crimes charged are possession offenses.

The state reasons that because the offenses were possession crimes, they occurred at the time Nguyen took possession of each firearm. The state cites to *State v. Bakken*, in which the supreme court determined that the defendant could receive multiple sentences for possession of separate images of child pornography because the images were obtained at different times. 883 N.W.2d 264, 270-71 (Minn. 2016). In that case, the images were downloaded to the defendant’s computer, and law enforcement was able to determine the exact time and date each image was downloaded. *Id.* at 270. In determining that the offenses were not part of a single behavioral incident, the supreme court observed that the offenses were not committed “at substantially the same time” because two of the offenses were separated by five days, and the other offenses were separated by over a month. *Id.*

In this case, the record is insufficient for us to review whether the offenses were committed as part of a single behavioral incident. This determination “involves an examination of all the facts and circumstances” and factual findings from the district court. *O’Meara*, 755 N.W.2d at 37. Because Nguyen did not object to the imposition of multiple sentences below, the district court did not make these findings. Nguyen admitted that he purchased the firearms at gun shows to avoid background checks and an officer testified that the firearms were obtained through private-party sales. Thus, it is possible that the firearms were purchased, and therefore possessed, at different times. But this determination requires additional factual findings from the district court. We therefore reverse and remand to the district court to make factual findings to determine whether the offenses occurred as part of a single behavioral incident.

Affirmed in part, reversed in part, and remanded.