

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0439**

State of Minnesota,
Respondent,

vs.

Jeffrey Richard Schwab,
Appellant.

**Filed March 7, 2022
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-20-3809

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, 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 Worke, Presiding Judge; Ross, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Jeffrey Schwab pleaded guilty to fleeing a police officer and possessing ammunition while he was ineligible to do so. The district court denied Schwab's motion for a downward departure from the statutory 60-month sentence on the ammunition-possession conviction.

Schwab argues on appeal that the district court unlawfully denied the motion by considering facts underlying the separate fleeing offense. Because Schwab presented no substantial and compelling reason to depart, we affirm the sentence with no need to address his challenge to the district court's fleeing-offense discussion.

FACTS

Jeffrey Schwab led Robbinsdale police in a vehicle chase that ended when Schwab plowed into a snowbank and disabled the car. Police arrested Schwab and searched the car, finding a jacket with a pocket that contained a single nine-millimeter caliber bullet. Because Schwab had been convicted of felony domestic assault in 2019, Minnesota law prohibited him from possessing the ammunition.

The state charged Schwab with the crimes of fleeing a peace officer and possessing ammunition while he was ineligible to do so. Schwab pleaded guilty and indicated that he intended to seek a downward dispositional and durational departure from the sentence presumed by the sentencing guidelines and from the 60-month mandatory minimum term of imprisonment arising from his ammunition-possession offense. The district court denied Schwab's departure motion and sentenced him to an executed, 60-month prison term for the ammunition conviction and a concurrent, 22-month term for the fleeing conviction.

Schwab appeals his sentence.

DECISION

Schwab challenges his sentence by contesting the district court's decision denying his motion for a downward durational departure from the statutory, 60-month prison term for illegally possessing the ammunition. We review the district court's decision declining

to depart for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Our deference to the district court rests on the fact that a guidelines-generated sentence is presumed to be correct, departures are by nature uncommon, the district court is not required to give reasons justifying its denial of a departure motion, and the district court is not obligated to depart even if the circumstances would support it. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014); *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *rev. denied* (Minn. Mar. 31, 2009). We see no abuse of discretion for the following reasons.

Schwab argues specifically that the district court erroneously rejected his motion for a durational departure from his statutorily mandated ammunition-possession sentence by improperly relying on circumstances underlying his separate and legally unrelated fleeing conviction. We need not address this argument directly. Even if Schwab’s argument contesting the district court’s reasoning has merit, we would consider reversing only if Schwab also identified sufficient support for his departure motion. He did not.

Whether Schwab proffered sufficient support for his departure motion is framed by statute. His conviction of possessing ammunition illegally under Minnesota Statutes section 624.713, subdivision 1(2) (2018), carries a mandatory minimum prison term of five years. Minn. Stat. § 609.11, subd. 5(b) (2018). The district court could depart downward from that mandatory sentence if Schwab identified “substantial and compelling reasons to do so.” *Id.*, subd. 8(a) (2018). And the offender’s conduct in committing the offense constitutes a substantial and compelling reason to depart durationally only if it “was significantly less serious than that typically involved in the commission of the offense.”

Solberg, 882 N.W.2d at 627. The only conduct Schwab identified to the district court when asking for a downward departure was the observation, “I will just point out [that] what we are talking about on the ammunition possession is a single round, a single 9 millimeter round, no gun involved, no box of ammunition.” He followed by urging, “It is really outside the norm of the types of cases . . . involving ammunition possession. And . . . that fact really sets this case apart.”

By denying Schwab’s motion, the district court implicitly determined that he failed to provide a substantial and compelling reason to depart. Schwab interprets the district court’s decision as if it agreed with his position that his possessing a single round is significantly less serious than the usual case and necessarily found that he provided a substantial and compelling reason to depart. He misreads the record. It is true that the district court briefly addressed Schwab’s argument about a single bullet and opined that “it’s arguable . . . that that fact is less serious than a usual case.” But the district court never concluded that (or even considered on the record whether) the cited circumstance was *significantly* less serious than conduct typically involved in the crime. *Speculating* that a circumstance is *arguably* less serious falls far short of *concluding* that it is *significantly* less serious. The district court never concluded that the circumstances of Schwab’s offense were significantly less serious than a typical offense, and we therefore turn to whether that decision was an abuse of discretion.

The district court did not abuse its discretion by finding that possessing one bullet is not significantly less serious than the typical offense. The statute and its obvious public-safety objective and the means to reach the objective frame our analysis. The

legislature is charged with defining criminal offenses and the punishment for those offenses. *State v. Osterloh*, 275 N.W.2d 578, 580 (Minn. 1978). And the legislature has established that an ineligible person “shall not be entitled to possess ammunition or a . . . firearm.” Minn. Stat. § 624.713, subd. 1 (2018). The legislature defines “ammunition” broadly to include “cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.” Minn. Stat. § 609.02, subd. 17 (2018). Because the legislature has indirectly established that plural “bullets” in that definition includes a singular “bullet,” *see* Minn. Stat. § 645.08(2) (2018), Schwab’s carrying even the single bullet undisputedly violates the statute. The legislature has therefore established that Schwab’s particular act was serious enough to warrant a five-year executed prison term. Minn. Stat. § 609.11, subd 5(b). *Cf. State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006) (“[A] sentencing court may not base an upward durational departure on factors that the legislature has already taken into account in determining the degree of seriousness of the offense.”). We observe that the legislature directed district courts to imprison previously violent offenders for five years whether they possessed ammunition without a gun or a gun without ammunition, indicating that both means of committing the crime are similarly serious. The statutory scheme is plainly prophylactic; it intends to prevent a violent offender from having even the opportunity to shoot another person by prohibiting him from possessing either of the two independently ineffectual elements.

Understanding the statutory scheme and purpose, we have no difficulty rejecting Schwab’s argument that his conduct is significantly less serious than possessing several bullets or a firearm, which he suggests is the typical case. His conduct implicates the harm

the legislature intended to prevent—the opportunity for an ineligible person to possess the means to injure any other person with a firearm. It is true that a single bullet fired from a gun would likely harm no more than one individual, but protecting even one individual squarely fits the legislative purpose. And as for whether a dangerous person’s possessing a single bullet is significantly less serious than his possessing several bullets, common knowledge and hundreds of single-shot murder victims in our caselaw would disagree. Considering the harm a single gunshot can cause in relation to the harm the statute seeks to avoid, possessing a single bullet is less serious than possessing several bullets only in the sense that falling from a 25-story window is less serious than falling from 50.

We do not suggest that an ineligible person who possesses a single bullet under unique circumstances will always fail to meet the durational departure standard. We conclude only that Schwab’s conduct did not meet that standard here. Because the district court implicitly found no substantial and compelling reason to depart and the record does not call that finding into doubt, the district court did not abuse its discretion by denying Schwab’s motion. Given the lack of any basis to warrant a departure here, we need not address Schwab’s argument that the district court improperly considered the conduct of his fleeing conviction.

Affirmed.