STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2037

State of Minnesota,
Respondent,

vs.

John Fleming,
Appellant.

Filed January 27, 2009
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. K1-06-1610

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

BJORKMAN, Judge

Appellant challenges his conviction of ineligible possession of a firearm and the district court's upward durational departure in sentencing. We affirm.

FACTS

Appellant John Fleming was charged with possession of a firearm by an ineligible person, a violation of Minn. Stat. § 624.713, subd. 1(b) (2004). The charge was premised on Fleming's admitted possession of a black metal Walther PPK/S BB gun. Fleming moved to dismiss the charge, arguing that a BB gun is not a firearm under Minn. Stat. § 624.713, subd. 1(b). The district court concluded that a BB gun is a firearm but nonetheless dismissed the charge, reasoning that prosecution for possession of a BB gun would negate the legislature's exclusion of a BB gun from the statutory definition of "pistol."[1] The state appealed, and this court reversed and remanded, holding that "even though a BB gun is not a 'pistol,' Fleming was prohibited from possessing a BB gun under the prohibition in Minn. Stat. § 624.713, subd. 1, against possessing a firearm." *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006) (*Fleming I*).

On remand, a jury found Fleming guilty of possessing a firearm as an ineligible person. The state sought an upward durational departure based on Minn. Stat. § 609.1095, subd. 2 (2004). Fleming waived his right to present the issue to a sentencing

[1] Section 624.713, subdivision 1(b), prohibits anyone previously convicted of a crime of violence from possessing "a pistol or semiautomatic military-style assault weapon or . . . any other firearm." The definition of "pistol" applicable to section 624.713 excludes BB guns, Minn. Stat. § 624.712, subd. 2 (2004), but there is no applicable statutory definition of "firearm."

jury. The district court granted the state's request, sentencing Fleming to 120 months in prison, rather than the presumptive 60-month term. This appeal follows.

D E C I S I O N

I. Appellant's conviction is supported by substantial evidence and the law.

Fleming first challenges his conviction, arguing that (1) this court erred in *Fleming I* by defining the term firearm without reference to Minn. Stat. § 609.669 (2004), a criminal statute that defines firearm and does not include a BB gun in the definition; and (2) the term firearm in Minn. Stat. § 624.713 does not provide adequate notice that possession of a BB gun is prohibited. In essence, Fleming argues that a BB gun is not a firearm and, therefore, Minn. Stat. § 624.713 does not prohibit possession of a BB gun. But that is the precise issue this court decided in *Fleming I*. 724 N.W.2d at 538.

Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case.*" *Kornberg v. Kornberg*, 525 N.W.2d 14, 18 (Minn. App. 1994) (quotation omitted), *aff'd*, 542 N.W.2d 379 (Minn. 1996); *see also State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007) (applying law-of-the-case doctrine in a criminal case). Although the law of the case "is a rule of practice, not a limitation on the power of the court to re-review and overrule a prior decision," *Lange v. Nelson-Ryan Flight Serv., Inc.*, 263 Minn. 152, 156, 116 N.W.2d 266, 269 (1962), the law-of-the-case doctrine, like stare decisis, is a rule this court adheres to absent compelling reasons to do otherwise. *Cf. Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 221 (Minn. 2007) (noting similar policy considerations in law-of-the-case and stare-decisis doctrines). Adherence to the

law-of-the-case doctrine is necessary to prevent obstinate litigants from engaging in wars of attrition through repeated appeals. *Lange*, 263 Minn. at 156, 116 N.W.2d at 269. Accordingly, "[i]ssues determined in a first appeal will not be . . . re-examined in a second appeal." *Bailey*, 732 N.W.2d at 623 (quotation omitted).

In *Fleming I*, we considered whether the term firearm in section 624.713 includes a BB gun. 724 N.W.2d at 539-40. Faced with a question of statutory interpretation, we acknowledged the rule of lenity but noted that the rule has no application to an unambiguous criminal statute. *Id.* at 539. We considered the language of section 624.713, noting that the term firearm, which was added to the statute in 1994, is not defined. *Id.* at 539-40. We therefore turned to relevant caselaw, which calls for broad construction of the term firearm to include a BB gun. *Id.* at 539 (citing *State v. Seifert*, 256 N.W.2d 87, 88 (Minn. 1977)). Fleming urged us to rely on section 609.669 rather than *Seifert*, but we rejected this argument. We concluded that the legislature, by declining to define "firearm" in section 624.713, presumptively adopted the *Seifert* definition. *Id.* at 540 (citing *State v. Newman*, 538 N.W.2d 476, 478 (Minn. App. 1995), *review denied* (Minn. Nov. 30, 1995)). Accordingly, we held that the term firearm includes a BB gun and, therefore, Fleming was prohibited from possessing a BB gun. *Id.* at 540. Fleming did not seek supreme court review.

This court carefully considered section 624.713 in *Fleming I* and applied the proper interpretive analysis. Our decision in *Fleming I* is the law of this case. Both of

Fleming's arguments invite us to conduct a second analysis of the same statute under precisely the same facts.[2] We decline to do so.

The district court did not err by conducting further proceedings consistent with *Fleming I*. *See Bailey*, 732 N.W.2d at 623 (explaining that an appellate decision on an issue applies to subsequent district court proceedings); *State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn. 2003) ("On remand, it is the duty of the district court to execute the mandate of this court strictly according to its terms."). And Fleming does not challenge the sufficiency of the evidence underlying his conviction. Because he has no evidence-based claim on appeal and the district court properly followed this court's mandate, Fleming's arguments with respect to his conviction fail.

II. The district court did not abuse its discretion in imposing a sentence that exceeded the guideline.

Fleming also argues that the district court abused its discretion in imposing a 120-month prison sentence rather than the 60-month guideline sentence. He contends that his "possession of [an unloaded] BB gun did not warrant a sentence over the presumptive term."

This court reviews sentencing departures for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006). Reversal is warranted if the reasons for the departure are improper or inadequate and there is insufficient evidence to justify an

[2] We note as well that Fleming waived his vagueness argument by failing to specifically raise it before the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (limiting appellate review to issues presented to and considered by the district court).

aggravated sentence for the offense of which the defendant is convicted. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003).

The district court sentenced Fleming pursuant to Minn. Stat. § 609.1095, subd. 2, the "dangerous-offender statute," which authorizes the district court to depart upward from the presumptive sentence if certain statutory criteria are met. *Neal v. State*, 658 N.W.2d 536, 543 (Minn. 2003). The statute provides:

> Whenever a person is convicted of a violent crime that is a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment sentence, the judge may impose an aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence if the offender was at least 18 years old at the time the felony was committed, and:
>
> (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and
>
> (2) the court finds that the offender is a danger to public safety and specifies on the record the basis for the finding, which may include:
>
> (i) the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications[.]

Minn. Stat. § 609.1095, subd. 2.[3]

Fleming suggests that possession of a BB gun is a lesser violation of Minn. Stat. § 624.713 than possession of other firearms and, therefore, does not warrant an

[3] The statute has been amended since 2004 to comport with the requirements of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), but the amendment did not alter the effect of the statute. *See* 2005 Minn. Laws ch. 136, art. 16, § 11, at 1118 (amending statutory language to provide for findings as to offender's dangerousness by "factfinder," rather than "court"); *State v. Kendell*, 723 N.W.2d 597, 604 & n.4, 610 & n. 11 (Minn. 2006) (discussing the *Blakely* prohibition of judicial factfinding and the related 2005 amendment).

aggravated sentence under section 609.1095. But the dangerous-offender statute does not establish degrees of qualification; it specifically defines the offenses that constitute "violent crimes," and possession of a firearm by an ineligible person is one such offense. *Id.*, subd. 1(d). The dangerous-offender statute provided an appropriate basis for the district court's upward durational departure.

Moreover, the district court considered the very argument Fleming now raises and tempered Fleming's sentence accordingly. The district court determined an aggravated sentence was warranted because the elements of the dangerous-offender statute, including Fleming's extensive criminal history, were satisfied. The district court noted the breadth of its sentencing authority, including the fact that it could impose the maximum sentence of 15 years' imprisonment. *See* Minn. Stat. §§ 609.1095, subd. 2 (permitting a sentence "up to the statutory maximum"), 624.713, subd. 2(b) (providing that a violation of subdivision 1, clause (b), is punishable by "imprisonment for not more than 15 years") (2004). But the district court declined to impose the full 15-year sentence, explaining that it chose not to "go[] to the max" because "it was an unloaded BB gun." On this record, the district court did not abuse its discretion by imposing a 120-month sentence.

Fleming presents two additional sentencing arguments in his pro se supplemental brief.[4] He first contends that there is insufficient record evidence to support the district

[4] Fleming also asserts in his pro se supplemental brief that he was prejudiced by various aspects of his trial and sentencing hearing. But he does not present any legal arguments or support his assertions with citation to legal authority. Because we note no obvious prejudicial error, these claims are waived. *See State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (deeming as waived criminal appellant's pro se assignments of error

court's finding regarding the predicate violent crimes required under Minn. Stat. § 609.1095. But our review of the record reveals ample support for the district court's determination that Fleming committed three prior violent crimes. Fleming also challenges the district court's failure to follow the recommendation contained in the presentence-investigation report. But a presentence-investigation recommendation does not obligate the district court to impose a particular sentence or limit the district court's authority or discretion in sentencing. *See State v. Park*, 305 N.W.2d 775, 776 (Minn. 1981) (instructing sentencing courts to consider each case on its merits and not accept presentence-investigation report as definitive). The district court did not abuse its discretion in sentencing Fleming to 120 months in prison.

Affirmed.

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because they lacked supportive arguments and legal authority, and no prejudicial error was obvious on mere inspection).