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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2221**

State of Minnesota,
Respondent,

vs.

Christopher John Lichtsinn,
Appellant.

**Filed August 6, 2012
Affirmed
Kalitowski, Judge**

Lincoln County District Court
File No. 41-CR-09-134

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Glen Petersen, Lincoln County Attorney, Tyler, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sean Michael McGuire, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this sentencing appeal following his conviction of first-degree criminal sexual
conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2008), appellant Christopher

John Lichtsinn contends that the district court abused its discretion when it refused to dispositionally depart from the presumptive sentence. We affirm.

DECISION

On appeal from any sentence imposed, this court may dismiss or affirm the appeal, or may vacate, or set aside the sentence imposed if we determine that the sentence is unreasonable or inappropriate. Minn. Stat. § 244.11, subd. 2(b) (2010). “An appellate court will accept a district court’s findings of fact unless they are clearly erroneous.” *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003). “[T]he [district] court has broad discretion” when deciding whether to depart from the guidelines, and Minnesota appellate courts will generally “not interfere with the exercise of that discretion.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984). It is a “rare case” that warrants reversal of a district court’s refusal to depart from the sentencing guidelines. *Kindem*, 313 N.W.2d at 7.

The district court must order the presumptive sentence unless “identifiable, substantial, and compelling circumstances” justify departure. Minn. Sent. Guidelines II.D (2009); *see Kindem*, 313 N.W.2d at 7 (stating that the district court may depart when substantial and compelling circumstances are present). In deciding whether to depart dispositionally, the district court should focus “on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A defendant’s amenability to probation may support a district court’s decision to depart dispositionally. *State v. Love*, 350 N.W.2d 359, 361 (Minn. 1984); *see also Heywood*, 338 N.W.2d at 244 (holding that

district court's reliance on defendant's amenability to probation and lack of criminal history was proper); *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981) (upholding downward dispositional departure where defendant had no prior criminal history, was particularly unamenable to incarceration, and particularly amenable to individualized treatment in a probationary setting). In *State v. Trog*, the Minnesota Supreme Court established a number of factors to consider when determining whether a person is amenable to probation, stating,

the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.

323 N.W.2d 28, 31 (Minn. 1982).

Appellant pleaded guilty to first-degree criminal sexual conduct for engaging in sexual intercourse with a 14-year-old relative. As part of the plea agreement, the state agreed to dismiss the remaining charges and cap its sentencing request at 108 months, a downward durational departure from the presumptive sentence of 144 to 173 months. *See* Minn. Sent. Guidelines IV (2009) (showing presumptive sentence for first-degree criminal sexual conduct for offender with zero criminal history score). Appellant was also permitted to seek a further downward departure. At sentencing, the district court refused to dispositionally depart, adopted the state's recommendation for a downward durational departure, and sentenced appellant to 108 months' incarceration.

Appellant challenged his sentence and this court reversed the sentence because the district court failed to consider the reasons appellant raised for a dispositional departure

under the sentencing guidelines and *Trog. State v. Lichtsinn*, No. A10-1555, 2011 WL 1743908, at *4 (Minn. App. May 9, 2011). On remand, appellant renewed his requests for downward durational and dispositional departures, and the district court again sentenced appellant to 108 months' incarceration.

Appellant challenges the district court's explanation for refusing to depart dispositionally, arguing that the court's findings are clearly erroneous and the evidence shows he is amenable to probation. He also argues that the district court improperly amended its findings to justify re-imposing the sentence that this court reversed in appellant's first appeal.

The district court considered appellant's amenability to treatment by reviewing appellant's psychosexual evaluation. The court found that appellant reported to the evaluator that he "did not consider himself to be a sex offender" and that the evaluator stated that appellant "has mood instability and could be bipolar" and "has some maladaptive personality traits that appear to be entrenched in his personality." The court further found that the evaluator "did not make recommendations as to whether or not the [a]ppellant should be incarcerated or placed on probation." The court noted that the evaluator identified competing factors as to whether appellant was at risk of reoffending but questioned whether the evaluator had undertaken a full risk assessment. And the court acknowledged that the evaluator stated that appellant could benefit from sex offender treatment "depending upon what happens at sentencing." Because the findings the district court made are supported by the psychosexual evaluation, and the evaluation

is inconclusive with respect to amenability to treatment, the district court did not clearly err when it did not find that appellant is amenable to treatment.

The court also considered each of the *Trog* factors relating to amenability to probation. With respect to the first factor, age, the court found that appellant “is a relatively young age, at age nineteen.” Although the court compared appellant’s age to the comparatively younger age of the victim without explaining why this age differential is relevant, the court repeated that appellant is at “a relatively young age.” The record supports this finding. And the record also supports the district court’s finding as to the second factor, that appellant “has no prior record.”

The district court found that appellant is not remorseful for his actions under the third *Trog* factor. Appellant challenges this finding because it contradicts the district court’s finding at the first sentencing hearing that appellant has “remorse, and [is] prepared to accept responsibility.” But at the resentencing hearing, the court expressly rejected its earlier finding as being “in error” based on its observations of appellant in the courtroom. The district court acknowledged that appellant had expressed remorse, but questioned appellant’s sincerity because “he recognizes he’s in the spotlight, but it appears to be situational.” The court observed that appellant was “stoic” in court “and has not, by his demeanor, demonstrated remorse.” Because a district court is in the best position to observe a criminal defendant, we “must defer to the district court’s assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision.” *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). Moreover, the district court’s amended finding is

reasonable given the court's opportunity to more fully observe appellant during the remand proceedings. And the finding as to appellant's lack of remorse is bolstered by the court's underlying finding that appellant made statements to the psychosexual evaluator in which he denied culpability for his crime and failed to recognize the harm his victim has suffered. On this record, we conclude the district court's finding that appellant was not remorseful for his actions is not clearly erroneous.

The district court also weighed appellant's cooperation with authorities and did not find that this factor supports a departure. The court found, and the record supports, that appellant "denied the incident on initial investigation, according to the police reports in the file, and did so until being told that the [victim] was pregnant."

Finally, appellant challenges the district court's finding under the last *Trog* factor regarding family and friend support. At one of two resentencing hearings, appellant made a statement expressing remorse, apologizing to his family, and stating that his parents had "helped [him] stay strong while [he] was sitting in prison." He also explained that his family, and the family of his victim, had recently reestablished contact and that he was looking forward to "go[ing] home and be[ing] with [his] family and friends." But appellant did not offer witnesses or evidence of his support network, relying instead on the argument of counsel that "we're all here today." In discussing this factor, the district court compared the evidence here with the glowing testimonials of family and neighbors in *Trog*, and stated, "In this case, uh, it is good to see friends and family members in attendance, but I do not have testimony of that type in this case." The district court's finding is supported by the evidence and the court's implicit suggestion

that this factor does not weigh in favor of amenability to probation is not clearly erroneous.

In sum, the district court's findings are not clearly erroneous. Although the district court made findings that could support a downward dispositional departure, the presence of mitigating factors does "not obligate the court to place defendant on probation or impose a shorter term than the presumptive term." *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984); *see State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (stating that an appellate court will not disturb the district court's sentence if the district court had reasons for refusing to depart, even if there are reasons for departing downward). Because the district court considered the reasons for departure and provided reasons for refusing to depart, we conclude that this is not the rare case in which the district court abused its discretion by refusing to depart from the guidelines.

Affirmed.