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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0490**

State of Minnesota,
Respondent,

vs.

Michael Joseph Contreras,
Appellant.

**Filed January 22, 2013
Affirmed
Hudson, Judge**

Ramsey County District Court
File No. 62-CR-11-6013

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Chutich, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges his sentence for first-degree assault, arguing that the district court abused its discretion by denying his request for a downward durational and

dispositional sentencing departure. Because the district court acted within its discretion, we affirm.

FACTS

On July 27, 2011, appellant's mother, P.D., arrived home from a family gathering with her 19-year-old son, M.D., and her 16-year-old nephew, E.D. When they arrived, a window was open and the window screen had been removed and broken. P.D. suspected that appellant, her 23-year-old son, had broken in, because he had previously used that mode of entry. Once inside, they discovered that it was in fact appellant who had broken into P.D.'s home. P.D. confronted appellant and told him to leave. E.D. became involved, and soon appellant and E.D. were embroiled in a heated argument. P.D. did not want a fight in her house, so she told them both to leave.

E.D. was the first to go outside. Appellant then left, followed by M.D. M.D. testified that he saw appellant grab something off a table before he went outside. Though M.D. did not see what it was, he believed it was a weapon of some kind. Once the three were outside, M.D. saw appellant and E.D. square off, and E.D. raised his fists to prepare for combat. M.D. then witnessed appellant swing at E.D. in an overhand motion, and immediately saw a cut on E.D.'s face and arm. E.D. began bleeding profusely, and appellant fled. No weapon or broken glass was ever recovered to explain the source of the cut.

E.D. was treated for a deep laceration that went from his forehead down to his eyelid, then from his cheekbone to his lips. E.D. was also treated for a laceration on his

right arm. E.D. received 100 stitches on his face and 12 stitches on his arm, and now has a permanent, visible scar on his face. The injury forced him to stop playing football.

Appellant was charged with one count of first-degree assault for inflicting “great bodily harm,” which includes “bodily injury which . . . causes serious permanent disfigurement.” Minn. Stat. § 609.221, subd. 1 (2010); Minn. Stat. § 609.02, subd. 8 (2010). Appellant was also charged with one count of first-degree burglary for committing a crime in P.D.’s home after entering without her consent, and one count of second-degree assault for assaulting E.D. with a dangerous weapon.

Appellant testified on his own behalf, and his account of events differed significantly from the accounts provided by P.D., E.D., and M.D. He testified that he had been at P.D.’s home for three hours before P.D., M.D., and E.D. arrived. Appellant claimed that when they arrived, E.D. demanded that appellant leave P.D.’s house, then tried to drag appellant outside to beat him up. He testified that when he finally did go outside, E.D. approached him, then began punching him in the chest. Appellant claimed he then forced E.D. away from him, at which point E.D. charged at appellant, and the two ended up falling to the ground. Appellant denied cutting E.D., explaining that he did not know how E.D. cut himself.

Before closing arguments, the jury was read a self-defense instruction and an abandonment instruction. The jury found appellant guilty of first-degree assault, but not guilty of the other two charges.

Prior to sentencing, appellant filed a motion for a downward dispositional and durational departure. Appellant argued that a downward departure was warranted given

appellant's challenging upbringing; appellant was not the primary aggressor and acted in self-defense; the victim had been drinking and acted confrontationally; appellant's honesty with his probation officer; and his general amenability to probation.

Appellant testified on his own behalf at the sentencing hearing, arguing that he was remorseful and did not intend for the injury to occur. The district court stated that appellant had not taken responsibility for his action, as evidenced by his testimony that he had not caused the cuts on E.D.'s face and arm. The district court found appellant's upbringing regrettable, but did not believe this circumstance warranted a downward departure. The district court rejected appellant's account of events, stating that appellant initiated the incident by breaking into his mother's home and that E.D. had been attempting to protect P.D. from appellant. The district court imposed an executed 122-month sentence, the presumptive sentence under the guidelines. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying his motion for a downward durational and dispositional departure. A district court may depart from the presumptive sentence provided by the sentencing guidelines only if "identifiable, substantial, and compelling circumstances" warrant such a departure. Minn. Sent. Guidelines II.D (2010). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The decision whether to depart from the guidelines is within the district court's discretion, and this court will not reverse that decision "absent an abuse of that discretion." *State v. Pegel*, 795 N.W.2d 251, 253

(Minn. App. 2011). The reasons offered by the district court to justify a downward departure must be supported by the record. *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). This court will only reverse a district court’s refusal to depart in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Although the district court is required to give reasons for departure, no explanation is required when a presumptive sentence is imposed. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). So long as the district court carefully evaluated all testimony and information prior to making a sentencing determination, this court may not interfere with the sentencing court’s exercise of discretion. *Id.* at 80–81. However, where compelling circumstances for departure exist, the district court must deliberately consider those factors before imposing the presumptive sentence. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984).

Durational departure

Appellant argues that the district court abused its discretion by failing to grant a downward durational departure. Only offense-related factors may be used to justify a downward durational departure. *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1985). Mitigating circumstances that may support a departure include the defendant’s passive role in the crime, the victim’s role as an aggressor, or other substantial grounds that tend to mitigate the offender’s culpability without amounting to a defense. Minn. Sent. Guidelines II.D.2.a (2010). The general question in considering a downward durational departure is whether the defendant’s conduct was “significantly . . . less serious than that

typically involved in the commission of the crime.” *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

Appellant argues that three offense-related mitigating circumstances existed. First, appellant argues that he was acting in self-defense. Second, appellant argues that E.D. was the aggressor and that appellant tried to peacefully leave the scene. Third, appellant argues that E.D. was intoxicated, while appellant was sober.

The district court considered appellant’s arguments relating to these mitigating factors and found that they did not warrant a downward departure. Because these arguments were given adequate consideration, the district court did not abuse its discretion by denying appellant’s motion. *See Van Ruler*, 378 N.W.2d at 80.

Furthermore, appellant’s arguments are not consistent with the jury verdict or the record. The jury was given self-defense and abandonment instructions, yet it convicted appellant of first-degree assault. Although appellant testified that E.D. was the aggressor, this testimony was not corroborated by any of the witnesses to the event. And as the district court pointed out, the conflict would not have occurred had appellant not broken into his mother’s house. Finally, while E.D.’s alleged intoxication—which he denied at trial—and appellant’s sobriety might have informed the jury as to whether appellant acted in self-defense, the jury rejected that theory. And the fact that appellant was lucid when he assaulted an intoxicated victim would certainly not diminish his culpability.

The district court duly considered the offense-related factors proffered to justify a downward departure and concluded that they were not supported by the verdict or the

record. The district court therefore did not abuse its discretion by denying appellant's motion for a downward durational departure.

Dispositional departure

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure. While the sentencing guidelines focus primarily on "the degree of a defendant's culpability," when considering a downward dispositional departure, the district court may "focus more 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). Many factors are relevant in determining whether a defendant is particularly suitable to individualized treatment in a probationary setting including "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Appellant argues that the district court erred by failing to consider his amenability to probation. The primary circumstances cited by appellant to support his motion for a dispositional departure were offense-related factors and appellant's difficult upbringing. The district court considered both of these factors before denying appellant's motion. Thus while the district court may not have explicitly used the phrase "amenability to probation," the district court addressed each *Trog* factor that appellant claimed demonstrated his amenability to probation. The record shows that the district court evaluated all testimony and information presented to it in making its sentencing

determination and therefore did not abuse its discretion in imposing the presumptive sentence. *See Van Ruler*, 378 N.W.2d at 81.

Appellant's prior record demonstrates that appellant was not, in fact, amenable to probation. Appellant was placed on probation two years earlier after a conviction of theft of a motor vehicle, but was sentenced for that offense following multiple probation violations. The present offense was committed four months after he was placed on probation for a drug-related offense. Appellant's failure to respond to the individualized treatment provided in a probationary setting was perhaps best illustrated on the date of the offense, when appellant committed first-degree assault within hours of meeting with his probation officer.

Appellant argues that the district court improperly denied appellant's request for a departure because appellant exercised his constitutional right to testify in his own defense. This characterization is incorrect. At the sentencing hearing, the state initially argued that appellant expressed no remorse and had not taken responsibility for his actions. Appellant later addressed this claim, asserting that he had accepted responsibility for his actions. The district court disagreed, stating that appellant had not accepted responsibility for his actions, given that he had denied any wrongdoing when testifying. Yet there is no indication that this rationale was the basis for the district court's decision. In fact, the district court also told appellant, "I understand at this point you have to be at least consistent with what you say."

At worst, the district court's statement indicates that the district court concluded that appellant's remorse was not a factor demonstrating his amenability to probation.

And this is a valid legal conclusion. An offender's minimization of his offense or refusal to admit guilt demonstrates a lack of remorse, and remorse is a relevant factor in considering a downward dispositional departure. *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003) (citing *Trog*, 323 N.W.2d at 31). It was therefore not improper for the district court to cite appellant's refusal to admit guilt as one reason to oppose appellant's motion for a downward dispositional departure.

In conclusion, the district court gave adequate consideration to all of the evidence and information presented before imposing the presumptive sentence. The record shows no offense-related or offender-related factors supporting a downward departure. The district court therefore did not abuse its discretion in denying appellant's motion for a downward dispositional departure.

Affirmed.