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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1536**

State of Minnesota,
Respondent,

vs.

Dale Larry Kramer,
Appellant.

**Filed May 13, 2013
Affirmed
Halbrooks, Judge**

Redwood County District Court
File No. 64-CR-11-739

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

Steven S. Collins, Redwood County Attorney, Ryan S. Hansch, Assistant County
Attorney, Redwood Falls, Minnesota (for respondent)

Richard L. Swanson, Chaska, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion for a downward
durational or dispositional departure, as well as the district court's restitution award.

Because the district court did not abuse its discretion in sentencing appellant and because appellant's restitution appeal is procedurally barred, we affirm.

FACTS

On September 23, 2011, appellant Dale Larry Kramer rammed his father's car multiple times with his vehicle, causing a fracture in his father's neck and injuring his stepmother. A jury found Kramer guilty of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2010), and first-degree criminal damage to property in violation of Minn. Stat. § 609.595, subd. 1(1) (2010). The sentencing guidelines provided for a presumptive sentence of 21 months, with a range of 18 to 25 months allowed without the need to substantiate departure. Kramer moved for a downward durational or dispositional departure.

The district court heard arguments for and against downward departure at the sentencing hearing. The district court sentenced Kramer to 25 months, concluding that Kramer is not amenable to probation based on his statements that he would rather go to prison than back down from a confrontation with his father and Kramer's lack of interest in anger management to address that relationship. The district court also noted that Kramer's age weighed against granting a departure, because "a middle age man . . . frankly should know better." It mentioned Kramer's prior record of non-felony "assaultive-type behavior" as a factor against departure, as well as Kramer's lack of remorse. The district court considered the factors of family support and cooperation with the district court, but concluded that they did "not result in substantial and compelling reasons to mitigate or to depart durationally downward."

Kramer's father and stepmother both submitted restitution claims. After sentencing, the district court noted that it could "anticipate already that there will be a need for, and there will certainly be a right to, a restitution hearing." The district court specifically found that Kramer has the ability to pay restitution. This appeal follows.

D E C I S I O N

I. Did the district court abuse its discretion by not granting Kramer's motion for a downward departure?

In order to justify a departure from the presumptive sentence provided by the sentencing guidelines, a district court must identify "substantial and compelling circumstances" warranting the departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). Even where these circumstances exist, a district court is not obligated to grant a departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). The decision not to depart from a presumptive sentence is firmly within the district court's exercise of discretion, and will not be reversed "as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Pegel*, 795 N.W.2d 251, 253, 255 (Minn. App. 2011) (quotation omitted).

Kramer raises the same arguments on appeal that he raised during the sentencing hearing. He argues that he is amenable to probation because he is "51 years old [and] has no history of prior criminal conduct towards his father." He states that he has had no contact with his father in over 17 years, he did not seek out his father on the day of the assault, and he did not intend to hurt his father when he rammed his car.

Kramer also argues that the district court failed to consider the facts in favor of probation, namely that he has not had any contact with his father in over 17 years, has complied with all terms and conditions of his prior assault convictions, and never assaulted his father in the past, despite knowing that his father lived nearby. Kramer concedes that he has no interest in changing his relationship with his father, but notes that he has a supportive relationship with the rest of his family.¹

The record reflects that the district court carefully evaluated all of the factors presented at the sentencing hearing before making its determination that there is no basis for a downward departure. The district court also offered a detailed explanation for why it decided to impose the presumptive sentence. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (“[A]n explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence. . . . [A]s long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” (citation omitted)).

Nothing in the record indicates that this is the “rare case” warranting reversal of the refusal to depart. *Jackson*, 749 N.W.2d at 360. The presence of mitigating factors does not require a district court to grant a downward disposition, *Bertsch*, 707 N.W.2d at

¹ Kramer also argues that “[t]he direction glea[n]ed from case law is the trial court is to determine if a[n] [a]ppellant has made objective changes in his/her life indicating the [a]ppellant is a ‘changed person’ and as a result is not the same person who appeared before the court at the time of his/her arrest.” Kramer fails to cite any law in support of this point or to explain its relevance, and likewise fails to state any reason why he should be considered a changed person.

668, or offer an explanation for imposing a presumptive sentence, *Van Ruler*, 378 N.W.2d at 80. The district court acted well within its discretion.

II. May Kramer challenge the district court's restitution order?

Kramer argues that the district court's restitution award is part of an unlawful sentence and that this court should reverse the restitution award and remand to the district court for a hearing or to order an appropriate amount. He argues that the amount of the award was an abuse of discretion because his father's insurance company denied one of his father's claims "pending further information" and because the expenses claimed by his stepmother are speculative.

The offender bears the burden of production when challenging the amount of restitution. Minn. Stat. § 611A.045, subd. 3(a) (2010). In order to meet this burden, the offender must submit "a detailed sworn affidavit . . . setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims." *Id.* The offender must also "request[] a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later." *Id.*, subd. 3(b) (2010). There is no indication in this record that Kramer complied with these requirements. The district court's opinion that a hearing would be appropriate is irrelevant; an offender may not appeal a restitution order without first properly challenging the order in district court. *See id.*; *see also State v. Bauer*, 776 N.W.2d 462, 480 (Minn. App. 2009) (holding that appellant's claim was procedurally barred because he failed to raise any legal or factual challenges to restitution before the district court).

Kramer argues that the restitution award is part of an unlawful sentence and can therefore be challenged at any time under Minn. R. Crim. P. 27.03, subd. 9. But Kramer presents no arguments explaining why this is an unlawful sentence. The district court did not abuse its discretion when ordering the original sentence, and there is nothing in the record to indicate that it lacked the legal authority to award restitution. *See State v. Gaiovnik*, 794 N.W.2d 643, 647 (Minn. 2011) (“The requirements of subdivision 3(a) govern when the offender disputes the amount or type of restitution. They do not, by their terms, apply when the dispute is over the court’s legal authority to order restitution.”). Kramer’s only challenge is to the amount of restitution, which is procedurally barred by his failure to comply with Minn. Stat. § 611A.045, subd. 3.

Affirmed.