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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2195**

State of Minnesota,
Respondent,

vs.

Joshua Allen VanHoutan,
Appellant.

**Filed July 15, 2013
Affirmed
Hooten, Judge**

Anoka County District Court
File No. 02-CR-11-3451

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

Anthony C. Palumbo, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

David R. Lundgren, Steven J. Meshbesh, Meshbesh & Associates, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Kalitowski, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

After entering an *Alford* plea for unintentional second-degree felony murder and receiving a sentence within the presumptive sentencing guidelines, appellant appeals,

arguing that substantial and compelling circumstances supported a downward durational and dispositional departure from the presumptive sentence. Because the district court did not abuse its discretion by imposing a presumptive sentence, we affirm.

FACTS

On May 11, 2011, appellant Joshua Allen VanHoutan was at the home he shared with his fiancée, their children, and his fiancée's father. That morning, at approximately 3:30 a.m., appellant's fiancée prepared to go to work while appellant gave a bottle to A.V., their five-month-old daughter. By the time appellant's fiancée left for work at around 4:00 a.m., A.V. had been fed and was placed back into her bed. At approximately 9:00 a.m., appellant telephoned his fiancée and advised her that something was wrong with A.V. He called again at approximately 10:00 a.m. and informed her that A.V. would not wake up and "her arms were frail." Shortly thereafter, his fiancée came home to take A.V. to Mercy Hospital. A.V. was admitted to Mercy Hospital at 12:30 p.m. and was diagnosed with "retinal hemorrhaging and bi-hemispheric subarachnoid hemorrhages." A.V. had been in cardiac arrest, but was stabilized and eventually transported to Minneapolis Children's Hospital. At Children's Hospital, surgery was performed to alleviate the pressure in her skull, but her doctors advised that A.V.'s injuries could be fatal.

Just after 1:00 p.m., the Coon Rapids police were dispatched to Mercy Hospital on a report of a possible "shaken baby" case. Appellant told one of the police officers that, after his fiancée left for work, A.V. was crying "a little bit," which he believed meant that she was still tired, so he put her back down to sleep. Appellant told this officer that he

checked on A.V. at 8:45 a.m. because she slept longer than normal, and found that she would only open her eyes a little, that she was somewhat non-responsive, and that her arms were limp. He then telephoned his fiancée about these symptoms.

Appellant also spoke to a police detective, explaining that when A.V. woke up between 6:30 and 6:45 a.m., he brought her into the living room to play. Appellant initially told the detective that he had not harmed A.V., though he stated that she is fussier than her twin and that she is difficult to calm down when she is upset. However, when the detective advised appellant that it was important for the doctors to understand the mechanism of injury in order to help her, appellant responded that he shook A.V. twice because she would not calm down. According to the complaint, “using a forensic interview doll, [appellant] demonstrated shaking [A.V.], causing her head to forcibly jerk back and forth.” Appellant indicated that A.V. quieted down, and that he laid her down until 10:30 or 11:00 a.m. Appellant was taken into custody after this statement and, in a post-*Miranda* statement, he stated that he first shook A.V. at about 6:30 a.m., and noticed that she was limp and had difficulty keeping her eyes open around 8:30 a.m.

As a result of her injuries, A.V. developed elevated intracranial pressure and seizure activity, and her neurologic status worsened during her hospital stay despite “aggressive medical intervention.” A.V. had no response to pain, so life support was withdrawn on May 15, 2011, and she died. The next day, appellant was charged with unintentional second-degree felony murder.

Appellant, while maintaining that he was innocent of the charge, entered a plea to the charge pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). In

exchange for his *Alford* plea, the state withdrew its motion for an upward durational departure and indicated that appellant could seek a downward departure from the presumptive sentence. In making his plea, appellant agreed that there was a substantial likelihood that a jury would find him guilty at a trial. Following extensive questioning by his attorney, the district court told appellant that it would not be hearing arguments about guilt or innocence once the plea was accepted, although, consistent with the plea agreement, it would hear appellant's arguments for a departure from the sentencing guidelines' presumptive sentence. As part of his plea, appellant denied that he "picked [A.V.] up and [] shook her," instead stating that he "played with her" and did not shake her. The prosecutor offered an extensive recitation of the facts the state would offer at trial, and the district court made several inquiries of appellant, after which it accepted appellant's *Alford* plea.

In conjunction with accepting the plea, and at appellant's request, the district court scheduled an evidentiary hearing and separate sentencing hearing. At the evidentiary hearing, appellant offered the testimony of a forensic pathologist retained by appellant to explain the mechanism of A.V.'s injuries. The forensic pathologist testified that the "cause of [A.V.'s] death was expansion of a chronic subdural hematoma" and that "[s]he had no evidence for any acute injury at the time of her collapse." Specifically, A.V. had no bruises, broken bones, or scalp injuries, and the hematoma in her skull was thought to be chronic by the treating radiologist and neurosurgeon. The forensic pathologist testified that, to the extent that this injury resulted from some sort of impact trauma, the "initial injury occurred at least a month or longer before her death." Finally, the forensic

pathologist testified that he believed that the staff at Mercy Hospital incorrectly intubated A.V., because the air pipe was inserted into her esophagus rather than into her lungs, causing inadequate oxygenation.

On the second day of the evidentiary hearing, the district court stated that it was “concerned” that there was confusion about the purpose of the hearing, noting it could not find appellant “not guilty” based upon a re-litigation of causation. The district court indicated that the only issue that would be considered would be whether appellant was “less culpable than any other person who has been convicted of this type of crime.” Appellant confirmed that he wanted to maintain his *Alford* plea, but, consistent with his plea agreement, was seeking a downward departure from the presumptive sentence.

Appellant called a neurosurgeon, which he had retained to review A.V.’s CT scans. The neurosurgeon testified that the CT scans showed some new bleeding in the brain area, as well as bleeding greater than three weeks old, indicating the presence of a “chronic fluid collection.” More specifically, the neurosurgeon testified that A.V. died of “cerebral edema, swelling of the brain,” as a result of a pre-existing “chronic subdural hematoma.”

Following the hearing, the prosecution submitted two letters in response to the medical testimony offered at the evidentiary hearings. The first letter was prepared by the medical examiner that performed the autopsy of A.V. and indicated that neither the “initial radiology studies” nor the autopsy revealed the chronic subdural hematoma posited by appellant’s experts. Moreover, the medical examiner’s letter stated that “[t]he single unifying event that explains the acute changes leading to [A.V.’s] death is the

admitted shaking episode.” The second letter, from a pediatrics professor specializing in child abuse, also indicated that abusive head trauma was the source of A.V.’s injuries and death, noting that she had never seen a child die from a chronic subdural hematoma.

In support of his request for a downward dispositional and durational departure, appellant argued that his case was “more akin to manslaughter” because A.V. had a pre-existing injury that made his mild shaking of the child medically significant. He requested that, if a prison sentence were imposed, he should receive no more than the 41-month sentence presumed for second-degree manslaughter. Claiming that “he did not shake [A.V.] out of anger, frustration, or with any other improper purpose,” appellant argued that he was simply “a father attempting to take care of his child, and he made the wrong decision.” He admitted that “he shook [A.V.] twice, but it was not hard, and he did not think it would hurt her.” This, appellant argued, mitigated his culpability for A.V.’s death.

Alternatively, appellant argued that he should receive a dispositional departure because of his age, his particular amenability to probation, the support of his family, his lack of a prior criminal record or a history of violence, his remorse for A.V.’s death, and his attitude and cooperation during the investigation and court proceedings. Appellant also pointed out that he participated in parenting classes while incarcerated and awaiting trial. Along with his motion, appellant submitted five letters in support of his character from his fiancée’s father and aunt, two of his sisters, and his grandfather. All of the letters are exceedingly positive and indicate that appellant was a loving father to his daughters. The court also heard statements in support of appellant from his mother,

grandmother, and father, as well as his fiancée, and his fiancée's brother. Appellant also addressed the court, stating that he had accepted responsibility for A.V.'s death, that he did not act "out of rage, anger, or aggression," that he "made a mistake in judgment by not bringing her [to] the hospital when [he] realized there was something wrong with her," and that he was not "an abusive or violent person."

The prosecutor argued that appellant should receive a 180-month sentence, which is the longest presumptive sentence under the sentencing guidelines. The prosecutor argued that appellant had not taken responsibility for his actions in causing A.V.'s death. The prosecutor also argued that a departure was not supported by appellant's medical evidence regarding the cause of A.V.'s death, because a departure would require the district court to believe that A.V.'s death was "a coincidence." The prosecutor also argued that a dispositional departure would be inappropriate because appellant, through his *Alford* plea and his prior denials that he shook A.V., had not cooperated, taken responsibility, or shown remorse for his actions.

The district court stated that it reviewed all the pertinent documents, including the pre-sentence investigation report (PSI) and the various medical documents and statements, and highlighted its limited authority under the sentencing guidelines, which require "an appropriate basis for a departure as has been established under the law." The district court stated that it would not find a basis for a departure based on culpability because the medical evidence indicated that A.V. died as a result of abusive head trauma. As to appellant's request for a dispositional departure, the district court stated that

[t]here are several factors that are hooked in with that and, to be honest, I will concede that [appellant] meets some of them. Some of those factors definitely weigh in favor of [appellant]

....

You were young. You have no criminal history at all that concerns me. And you clearly have the support of your family. Off the charts, in fact, if I may say that. There was an earlier comment made that I think [appellant's counsel] said he has the support of everybody. Most defendants I have seen here don't have the support of anybody.

However, under the law, I can't find that the severity of this offense and the totality of the circumstances, create a substantial and compelling reason[] to depart.

The district court then imposed a 128-month executed prison term, which is the lowest presumptive sentence according to the sentencing guidelines. This appeal follows.

DECISION

A district court “shall pronounce a sentence within the applicable range” for a crime unless there exist “identifiable, substantial, and compelling circumstances” to support a departure from the presumptive sentence. Minn. Sent. Guidelines II.D (2011). Departures from the presumptive sentence are justified only when substantial and compelling circumstances are present in the record. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002). One permissible reason for a downward departure is when “substantial grounds exist which tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.” Minn. Sent. Guidelines II.D.2.a.(5).

So long as the sentencing court “carefully evaluated all the testimony and information presented before making a [sentencing] determination,” we will not interfere with the district court’s exercise of discretion. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011). “[T]he mere fact that a mitigating factor is present in a particular

case does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term.” *Id.* at 253–54 (quotation omitted); *see also State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (stating that, even if “[a]nother district court might have found a dispositional departure appropriate,” the court would not interfere with the district court’s exercise of discretion). Thus, even when substantial and compelling circumstances exist, the district court has broad discretion in deciding whether or not to grant a departure from the sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a “rare case” will an appellate court reverse a sentencing court’s refusal to depart. *Id.*

Durational departure

Appellant first argues that the district court abused its discretion by imposing the presumptive sentence because there were substantial and compelling offense-related circumstances warranting a durational departure. While conceding that A.V. died from abusive head trauma, appellant argues that his mild shaking of the child was significantly less serious than the typical unintentional second-degree murder. In support of his claim, appellant presented medical evidence that A.V. was a fragile child with a pre-existing chronic subdural hematoma, which made her more susceptible to injury or death even with gentle shaking.

In response, the state maintains that the district court did not abuse its discretion by declining to downwardly depart because, by virtue of appellant’s *Alford* plea and the medical evidence offered in support of appellant’s plea, there was no dispute that appellant caused A.V.’s death. The state argues that to the extent that appellant’s medical

evidence questioned causation, it was irrelevant, and that the district court did not abuse its discretion by crediting the state's medical evidence rather than appellant's.

A district court may grant a downward durational departure when “the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). Only offense-related factors may be used to justify a downward durational departure. *Cf. State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013).

Here, the district court indicated that it considered the “quite extraordinary” volume of information provided in conjunction with the sentencing and acknowledged that substantial and compelling reasons were necessary in order to depart from the presumptive sentence. The district court considered the appellant’s claim that he was less culpable because A.V.’s chronic subdural hematoma made her more fragile and more susceptible to trauma. However, after reviewing the medical testimony, the district court specifically rejected the claim of appellant’s medical experts that a chronic subdural hematoma resulting from birth could cause the death of a child and that without such pre-existing condition, a child could not die as a result of being shaken. Instead, the district court found the testimony of the state’s medical experts that A.V. died as a result of abusive head trauma, which occurred when she was shaken, to be “persuasive”.

It is well settled that we are to defer to the district court’s credibility determinations. *State v. Johnson*, 548 N.W.2d 426, 435 (Minn. 1997). The district court, after a careful review and evaluation of the record, did not find identifiable, substantial, and compelling reasons to support a departure from the presumptive sentence. Since we

defer to the district court's credibility determinations in resolving conflicting medical testimony, and the district carefully evaluated the testimony and information presented before sentencing appellant, we conclude that the district court did not abuse its discretion in failing to find substantial and compelling reasons for a downward departure of appellant's sentence.

Noting that appellant pleaded guilty to unintentional second-degree murder, the district court accepted his claim that he did not intend to kill A.V. when he shook her. *See* Minn. Stat. § 609.19, subd. 2(1) (2010) (criminalizing causing "the death of a human being, without intent to effect the death of any person"). As a result, the intentionality associated with appellant's crime, and the relative culpability attached thereto, is considered within the presumptive sentence. 10 *Minnesota Practice*, CRIMJIG 11.30 (2006) (stating that "[i]t is not necessary for the State to prove the defendant had an intent to effect the death of" the victim to be convicted of unintentional second-degree felony murder). Even if appellant was mistaken about the amount of force his five-month-old daughter could withstand, the district court did not abuse its discretion in finding that this mistake did not reduce his culpability for an unintentional murder.

For all of these reasons, and because we afford deference to the district court's decision declining to depart from the presumptive sentence, we conclude that the district court did not err in imposing a sentence within the presumptive range.

Dispositional departure

Appellant also argues that the district court abused its discretion by declining to grant a downward dispositional departure. Appellant argues that offender-related

circumstances strongly favor a dispositional departure, and that caselaw would have supported the district court's decision to grant the departure. The state argues that the district court's exercise of discretion, notwithstanding support for a departure, is supported by evidence that appellant was inconsistent in his descriptions and acceptance of the crime.

In weighing whether to impose a downward dispositional departure from the presumptive sentence, a district court considers “the defendant as an individual and [focuses] on whether the presumptive sentence would be best for [the defendant] and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). In considering whether to grant a dispositional departure, the district court must consider the defendant's “particular amenability to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Relevant considerations may include the defendant's age, prior record, remorse, cooperation, attitude in court, and the support of friends or family. *Id.* Courts are not required to discuss all of the *Trog* factors before imposing the presumptive sentence. *Pegel*, 795 N.W.2d at 254 (noting “there is no requirement that the district court must” discuss all of the *Trog* factors); *see also 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.”). The district court need only have “deliberately considered circumstances for and against departure and exercised its discretion.” *Pegel*, 795 N.W.2d at 254. Ultimately, a district court does not abuse its discretion by refusing to depart “from a presumptively executed prison sentence, even if there is evidence in the record that the

defendant would be amenable to probation.” *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009).

In declining to grant a dispositional departure, the district court expressed some concern that appellant was inconsistent in his descriptions of what occurred on the morning A.V. was taken to the hospital. For example, appellant admitted to a police detective that he shook A.V., “causing her head to forcibly jerk back and forth.” But, the PSI indicates that appellant denied shaking her, and stated that he was merely playing with her. At the sentencing hearing, appellant argued that the PSI misrepresented his statement and admitted that he shook her, though not aggressively.

The district court noted that it “spent [a] considerable amount of time weighing all of these arguments and weighing the facts in this case.” The district court acknowledged that some of the *Trog* factors favored a dispositional departure. Namely, the district court cited appellant’s young age, his lack of criminal record, and the support of his family, his fiancée, and her family. However, the district court stated that it could not “find that the severity of this offense and the totality of the circumstances, create a substantial and compelling reason[] to depart.”¹

Even with these valid reasons for departure, we note that the district court is not required to justify its decision to impose the presumptive sentence, but is only required to

¹ Appellant argues that the district court erred as a matter of law by erroneously stating that it did not have the authority to grant a dispositional departure. But we conclude that this statement merely references caselaw guiding the district court’s exercise of discretion rather than indicating the district court’s belief that it was not authorized to deviate from the guideline sentence.

carefully consider the reasons for and against a dispositional departure. In this case, the district court's denial of a dispositional departure came after a lengthy discussion of its reasons for denying the departure, as well as noting that some factors weighed in favor of departure. Moreover, the district court explicitly stated that it considered all of the factors in making its decision. Because this consideration is all that is required of the district court, and because of the deference we grant to district court decisions on sentencing departures, we conclude that the district court did not abuse its discretion in imposing a sentence within the sentencing guidelines' presumptive range.

Affirmed.