STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1750

State of Minnesota,
Respondent,

vs.

David Lee King,
Appellant.

Filed August 26, 2013
Affirmed
Connolly, Judge

Becker County District Court
File No. 03-CR-11-1745

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

Michael Fritz, Becker County Attorney, Tammy Merkins, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cleary, Judge.

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

CONNOLLY, Judge

Appellant challenges his sentence, arguing that the district court abused its discretion when it denied his motion for a downward durational departure. Because we see no abuse of discretion, we affirm.

FACTS

In May 2012, appellant David King pleaded guilty to a charge of first-degree criminal sexual conduct, admitting that he forced the victim into her bedroom, engaged in intercourse against the victim's will, and held the victim down during the assault. The victim suffered a bruise on her wrist and pain in her groin and leg.

The guideline sentence range for this severity-level-A offense and appellant's criminal-history score of six was 306 to 360 months in prison. In exchange for appellant's guilty plea, respondent State of Minnesota agreed to seek no more than the minimum presumptive sentence, 306 months in prison.

Appellant moved for a downward durational departure on the grounds of: (1) his mental impairment due to lack of medication, (2) his prior history of property crimes rather than violent crimes, (3) the lack of significant injury to the victim, and (4) his remorse. His motion was denied, and he was sentenced to 306 months in prison.

He argues that the denial of his motion was an abuse of discretion.

D E C I S I O N

A district court has broad discretion to depart from the presumptive sentence under the sentencing guidelines. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). A district

court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" that warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Id.*

The district court, after telling both parties it had read their memoranda twice, said, "Under the circumstances, based on the conduct, I'm not going to depart durationally . . . . You could have 360 months here, the top of the box. This conduct occurred in the privacy of this woman's home, and I think under the circumstances the 306 months is appropriate." The fact that the crime occurred in the victim's home, where she had a reasonable expectation of privacy, was an aggravating factor that could have been used to support an upward departure. *See* Minn. Sent. Guidelines II.D.2 (2010). However, appellant received the minimum presumptive sentence.

Appellant argues that the district court ignored four mitigating factors: (1) appellant's mental state, (2) his prior criminal history, (3) the lack of seriousness of appellant's offense, and (4) his remorse. None of appellant's mitigating-factor arguments has merit.

First, appellant claims that his mental state was impaired because he was not taking his medication. *See* Minn. Sent. Guidelines II.D.2a ("Factors that may be used as reasons for departure [include] . . . [the fact that t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed."); *see also State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007) ("[I]n order to constitute a mitigating factor in sentencing, a defendant's impairment must be

'extreme' to the point that it deprives the defendant of control over his actions."). Nothing in the record indicates that appellant was deprived of control over his actions when he accepted the victim's invitation to enter her apartment so she could cook him some food; when he dragged her into the bedroom, removed her pants, and raped her; or when he lied to the police by saying he had not been in the victim's apartment complex, did not know anyone in that complex, and had not had sexual intercourse for 24 hours. Moreover, appellant stated that he believed himself to be in good mental health during the presentence investigation.

Second, appellant argues that his "criminal history score of 6 does not reflect a criminal history of violent person offenses or sexual offenses." Appellant offers no legal support for his implied argument that the nature of a defendant's prior felonies is a mitigating factor in sentencing. Moreover, one of appellant's criminal-history points resulted from his most recent offense, a third-degree assault committed while he was in jail, for which he was sentenced in January 2011; another point was his failure to register as a predatory offender, for which he was sentenced in November 2009. There was no abuse of discretion in not considering the nature of appellant's criminal-history points as a mitigating factor.

Third, appellant relies on Minn. Stat. § 609.342, subd. 1(e) (2012) (defining first-degree criminal sexual conduct as involving an act that "causes personal injury to the complainant"), Minn. Stat. § 609.341, subd. 8 (2012) (defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7,"); and Minn. Stat. § 609.02, subd. 7 (2012) (defining "bodily harm" as "physical pain or injury, illness, or any

impairment of physical condition") to argue that his acts did not meet the "personal injury" statutory requirement because the victim suffered only a small bruise on her wrist and pain in her groin and leg. But, at the plea hearing, appellant answered "Yes" when asked, "[Y]ou held her down while you engaged in that sexual intercourse with her?"; "[The victim] went to the hospital and . . . had some significant pain in her legs and her hip area so that she had to be transported into the hospital by wheelchair?"; and "[A]s a result of that assault on her, she had some bruising on her arm where you held her down?" Thus, appellant's own testimony refutes his argument that "the personal injury in [this] case is quite minimal."

The district court did not abuse its discretion by not considering the victim's lack of personal injury as a mitigating factor.

Fourth, appellant argues that his remorse was a mitigating factor justifying a downward durational departure. But "[a]s a general rule, a defendant's remorse bears only on a decision whether or not to depart dispositionally, not on a decision to depart durationally . . . ." *State v. Yang*, 774 N.W.2d 539, 564 (Minn. 2009). In any event, the presentence investigation noted that appellant "has expressed no remorse for his actions . . . ." Appellant argues that he pleaded guilty "rather than . . . putting the victim through the ordeal of a trial," but this argument ignores the fact that appellant pleaded guilty in exchange for a maximum sentence of 306 months, rather than 360 months. There was no abuse of discretion in not considering appellant's remorse as a mitigating factor.

Even if any of the mitigating factors had been present, "[t]he fact that a mitigating factor was clearly present [does] not obligate the court to . . . impose a shorter term than the presumptive term." *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). Thus, it would not have been an abuse of discretion to impose the minimum presumptive sentence even with the presence of mitigating factors. This is not the "rare" case where the decision not to depart from the minimum guideline sentence was an abuse of discretion. *See Kindem*, 313 N.W.2d at 7.

Affirmed.