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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1565**

State of Minnesota,
Respondent,

vs.

Jessten Gordon Grover,
Appellant.

**Filed August 14, 2017
Affirmed
Schellhas, Judge**

Itasca County District Court
File No. 31-CR-15-1345

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

John J. Muhar, Itasca County Attorney, Todd S. Webb, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Schellhas, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his presumptive guidelines sentence for first-degree criminal sexual conduct, arguing that the district court abused its discretion in denying his motion for a downward durational departure. We affirm.

FACTS

Between about July 1 and October 18, 2014, appellant Jessten Grover, who was then 16 or 17 years old,¹ engaged in sexual penetration with 12-year-old D.B. on more than one occasion and impregnated her. The district court certified Grover for adult prosecution, and respondent State of Minnesota charged Grover with ten counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2014) (sexual penetration with complainant under 13 years of age and more than 36 months younger than actor). Grover appealed his adult certification, and we affirmed. *In re Welfare of J.G.G.*, No. A15-0865, 2015 WL 7357605, at *1, *5 (Minn. App. Nov. 23, 2015).

At Grover's jury trial, the state presented D.B.'s testimonial acknowledgement of a dating relationship with Grover that included sexual penetration, DNA evidence proving that D.B.'s child was fathered by Grover, and a recording of an incriminating statement that Grover made to police. The state also introduced as "[e]vidence of domestic conduct," Minn. Stat. § 634.20 (2016), testimony and exhibits showing that Grover and D.B. had persisted in mutual contact in violation of domestic-abuse no-contact orders issued by the

¹ Grover's 17th birthday fell within the specified date range.

district court in connection with the criminal-sexual-conduct charges. The jury found Grover guilty of two counts of first-degree criminal sexual conduct and acquitted him of the remaining eight counts.

Grover moved for a downward dispositional or durational departure. The district court conducted a contested sentencing hearing, at which a defense expert testified that Grover suffers from bipolar disorder that was undiagnosed and untreated at the time of his offense. The defense expert also testified generally regarding brain development, judgment, and decision-making during adolescence. The court sentenced Grover to 144 months in prison for one count of first-degree criminal sexual conduct, a presumptive guidelines sentence.

This sentencing appeal follows.

D E C I S I O N

The Minnesota Sentencing Guidelines provide sentencing ranges that are “presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines 2.D.1 (2014). “[A] court must impose the presumptive sentence—that is, a sentence within the applicable disposition and range—‘unless there exist identifiable, substantial, and compelling circumstances to support a departure.’” *State v. Fleming*, 883 N.W.2d 790, 795 (Minn. 2016) (quoting Minn. Sent. Guidelines 2.D.1). “Substantial and compelling circumstances for a durational departure are those which demonstrate that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotations omitted).

“[T]he presence of mitigating factors does ‘not obligate the court to place [a] defendant on probation or impose a shorter term than the presumptive term.’” *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013) (second alteration in original) (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)), review denied (Minn. Feb. 18, 2014). If one or more mitigating factors is shown, “[w]hether to depart [downward] from the sentencing guidelines rests within the district court’s discretion, and the district court will not be reversed absent an abuse of that discretion.” *State v. Pegel*, 795 N.W.2d 251, 253–54 (Minn. App. 2011) (citing *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)).

“Only in a rare case will a reviewing court reverse the imposition of a presumptive sentence.” *Id.* at 253 (citing *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)). But “[i]f the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure.” *Id.* (quotation omitted). “When the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue.” *Id.* Moreover, we may modify any sentence that is “unreasonable, inappropriate, excessive, [or] unjustifiably disparate,” Minn. Stat. § 244.11, subd. 2(b) (2016), or if “modification is in the interest of fairness and uniformity,” *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008) (quotations omitted).

In this case, Grover argues that the district court abused its discretion by imposing a presumptive guidelines sentence instead of granting his motion for a downward durational departure. He begins by asserting that the court was presented with un rebutted evidence of two mitigating factors: (1) due to his untreated bipolar disorder, Grover “lacked

substantial capacity for judgment” when he committed first-degree criminal sexual conduct; and (2) “other substantial grounds exist tending to mitigate Grover’s culpability” for that crime, specifically, (a) Grover’s youth and its negative impact on his capacity for judgment, and (b) the “consensual” nature of Grover and D.B.’s adolescent sexual relationship.

The sentencing guidelines provide a “nonexclusive list of factors that may be used as reasons for departure,” including the mitigating factor that “[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.” Minn. Sent. Guidelines 2.D.3.a.(3) (2014). The guidelines also identify as a mitigating factor that “[o]ther substantial grounds exist that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.” *Id.* (5) (2014).

But “[a] durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). An offender’s age is a characteristic of the offender relevant to dispositional departure, not a characteristic of the offense relevant to durational departure. *Id.* at 624. Likewise, the offender’s purported “mental impairment is an offender-related characteristic that cannot justify a downward durational departure.” *Rund*, 896 N.W.2d at 534 n.11. It follows that the district court had no discretion to grant Grover’s motion for a downward durational departure based on his youth or on evidence regarding his untreated bipolar disorder and any natural limitations of his adolescent brain, even if that evidence was both credible and unrebutted.

By contrast, we believe that the “consensual” nature of Grover and D.B.’s adolescent sexual relationship is an offense-related characteristic that may qualify as a “substantial ground[] . . . that tend[s] to excuse or mitigate [Grover]’s culpability, although not amounting to a defense.” Minn. Sent. Guidelines 2.D.3.a.(5); *see* Minn. Stat. § 609.342, subd. 1 (2014) (“A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant’s age nor consent to the act by the complainant is a defense . . .”). Evidence presented at trial indicates that D.B. appeared to be more “mature” than other children her age; Grover and D.B. met at a school function; D.B. initially lied to Grover about her age, claiming to be “14 going on 15” years old; Grover and D.B. began a dating relationship about six months before having sex; Grover and D.B. discussed whether to have sex, and whether to use “protection,” before having sex; D.B. agreed to have sex with Grover; and Grover and D.B.’s relationship involved emotional intimacy as well as physical intimacy. And the following colloquy occurred between Grover’s attorney and the defense expert at the contested sentencing hearing:

Q: [I]n your experience, are the . . . facts in this case somewhat less serious than those typically found in First Degree Criminal Sexual Conduct cases?

A: Well, in many Criminal Sexual Conduct in the First Degree cases, you’re talking about an adult who’s had sex with . . . a very small child, or you’re talking about someone who used a weapon and committed a violent rape.

Q: Okay. So would you say this is a little bit less serious than the general First Degree Crim Sex[?]

A: Yes.

But even if the “consensual” nature of Grover and D.B.’s adolescent sexual relationship is a mitigating factor here, the district court was not required to depart. *See Wells*, 839 N.W.2d at 781 (stating that “the presence of mitigating factors does not obligate the court to place a defendant on probation or impose a shorter term than the presumptive term” (quotation omitted)). Before imposing the 144-month prison sentence, the court admonished Grover:

You continued to engage in [a] relationship with [D.B.], even after learning . . . that she was only 12 years old, and even researched the law regarding criminal sexual conduct. You’d been warned about [D.B.]’s age, and you knew your actions were against the law, and yet you persisted.

Clearly, the court considered and rejected Grover’s argument that the “consensual” nature of Grover and D.B.’s adolescent sexual relationship rendered his criminal conduct significantly less serious than that typically involved in first-degree criminal sexual conduct. The court had discretion to do so. *See Pegel*, 795 N.W.2d at 253–54 (stating that even if one or more mitigating factors is shown, “[w]hether to depart [downward] from the sentencing guidelines rests within the district court’s discretion”).

Grover also claims that the district court denied his motion for a downward durational departure “in part because [the court] had ‘previously found that no mitigating circumstances exist’” in the adult-certification proceedings. *See J.G.G.*, 2015 WL 7357605, at *1–6 (discussing district court’s findings on six public-safety factors relevant to adult certification, including seriousness of Grover’s offense in terms of community protection). That claim has no support in the record. Before imposing sentence, the court explained its reasoning at length, recounting the evidence presented at trial and at the

contested sentencing hearing and including but one glancing reference to the adult-certification proceedings. Because the district court did not rely on its adult-certification findings at sentencing, we need not consider whether such reliance would have been improper.

Finally, Grover asserts that the district court “focused exclusively on the evidence submitted in support of a dispositional departure and ignored the evidence supporting a durational departure.” Grover is correct that the district court’s sentencing explanation centered on factors, such as Grover’s purported mental impairment at the time of his offense, that are relevant to dispositional departure and are not relevant to durational departure. But Grover has not identified any evidence supporting durational departure that the district court failed to consider, and we see no such evidence on this record.

Instead, our review of the record indicates that the district court correctly articulated the standards for downward dispositional and durational departures, summarized the evidence presented at trial and at the contested sentencing hearing, and explained why that evidence did not persuade it to depart from a presumptive guidelines sentence. We therefore conclude that the district court did not abuse its discretion in denying Grover’s motion for a downward durational departure. *See State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (stating that “[w]e will affirm the imposition of a presumptive guidelines sentence when the record shows that the sentencing court carefully evaluated all the testimony and information presented before” refusing to depart), *review denied* (Minn.

Sept. 17, 2013). We also decline to exercise our authority under Minn. Stat. § 244.11, subd. 2(b), to modify Grover's sentence.

Affirmed.