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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1896**

State of Minnesota,
Appellant,

vs.

Amanda Jean Jenniges,
Respondent.

**Filed June 12, 2017
Reversed and remanded
Bratvold, Judge**

Dakota County District Court
File No. 19HA-CR-16-1174

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

James C. Backstrom, Dakota County Attorney, Elizabeth Swank, Assistant County Attorney, Hastings, Minnesota (for appellant)

Derek W. Hansen, Ryan M. Pacyga, Ryan Pacyga Criminal Defense, Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Kirk, Judge; and Toussaint,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

Bratvold, Judge

In this sentencing appeal, appellant State of Minnesota argues that the district court abused its discretion when it granted respondent a downward durational departure based on factors typically used to support a dispositional departure. Because the district court improperly based the durational departure on offender-related factors, instead of the required offense-related factors, we reverse and remand.

FACTS

On March 27, 2016, police and emergency personnel responded to a report of a one-car accident. Upon arrival, officers saw that a van had crashed into a tree. Respondent Amanda Jean Jenniges stood on the curb. Jenniges admitted that she drove the van and had been drinking alcohol. She stated that she felt “fine to drive” and “was the most sober to drive.” As they spoke, the officer detected an “overwhelming odor of alcoholic beverage” emanating from Jenniges and observed that her eyes were watery and bloodshot. The officer administered standard field sobriety tests, which Jenniges failed. A preliminary breath test was completed and it showed that Jenniges’s alcohol concentration “was significantly in excess of the legal limit.” Later, her alcohol level registered at 0.189.

Jenniges’s mother and father, both passengers in the van, were injured and taken to the hospital. Her mother had a broken pelvis, collapsed lung, fractured ribs, and traumatic brain injury. She was in surgery for several hours and her “injuries were so significant she could have died.” Jenniges’s father required internal and external stitches to close a laceration to his leg.

The state charged Jenniges with felony-level criminal vehicular operation resulting in great bodily harm (count one) and gross-misdemeanor-level criminal vehicular operation resulting in bodily harm (count two). Jenniges entered a “straight” guilty plea to both counts, with the explicit understanding that there was no agreement regarding her sentence. Jenniges reserved the right to argue for both a dispositional and durational departure at sentencing.

Probation submitted a presentence investigation report and recommended the guidelines sentence, *i.e.*, that the court would stay execution of an 18-month sentence for count one with five years on probation, including conditions that required 30 days in jail. The report recommended staying imposition of sentence on count two.

At sentencing, Jenniges moved for a downward durational departure on count one, arguing that the victims did not believe she should face a felony sentence, she had completed a Mothers Against Drunk Driving panel with the victims, and she had completed 48 hours of outpatient treatment.¹ Jenniges also told the district court that the accident had “turned my family’s lives upside down” and she took responsibility for what happened. Jenniges asked the district court to impose a gross misdemeanor sentence and stay execution of a 365-day sentence, with conditions including 30 days of AlcoSensor

¹ In her written motion, Jenniges relied on Minn. R. Civ. P. 27.03, subd. 2, which allows a party to challenge a presentence investigation report. It appears, however, that Jenniges actually sought to have her felony conviction deemed to be a gross misdemeanor pursuant to Minn. Stat. § 609.13, subd. 1, which authorizes a district court to impose a gross misdemeanor sentence for a felony conviction, and thereby “the conviction is deemed to be” a gross misdemeanor.

monitoring each year of probation. Jenniges did not differentiate between counts one and two.

The state opposed the departure request, arguing that Jenniges's crime was not less serious than a typical criminal-vehicular-operation crime, the victims' injuries were significant, and mitigating circumstances were not present to support a departure. The state requested that the court stay execution of an 18-month sentence for count one, with five years of probation, and conditions including 180 days in jail. The state sought two years of probation for count two.

The district court granted Jenniges's motion. On count one, the district court imposed a gross misdemeanor sentence by staying execution of a 365-day sentence, with six years of probation, and conditions including 30 days in jail or on AlcoSensor monitoring each year of probation. On count two, the district court also sentenced Jenniges to the same gross misdemeanor sentence, consecutive to count one, for a total of 12 years on probation. To support its decision, the district court cited Jenniges's amenability to probation and stated that the longer probationary term would "ensure continued sobriety." The state appeals.

D E C I S I O N

This court reviews a district court's decision to depart from a presumptive guidelines sentence for abuse of discretion. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). The district court's reasons for departing from the presumptive sentence are reviewed de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). If the district court's reasons for departing from a guidelines

sentence are legally permissible and supported by the record, the departure will be affirmed. *Hicks*, 864 N.W.2d at 156. If the district court’s reasons are “improper or inadequate” or there is insufficient evidence in the record to justify the departure, the departure will be reversed. *State v. Heath*, 685 N.W.2d 48, 65 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

“The Minnesota Sentencing Guidelines promote uniformity, proportionality, and predictability in sentencing.” *Hicks*, 864 N.W.2d at 156; *see also* Minn. Sent. Guidelines 1.A (2014). A guidelines sentence is “presumed to be appropriate,” and the district court should not deviate from a guidelines sentence “unless there exist identifiable, substantial, and compelling circumstances” to support a deviation. Minn. Sent. Guidelines 2.D.1; *see also Taylor v. State*, 670 N.W.2d 584, 587–88 (Minn. 2003). “Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case.” *Taylor*, 670 N.W.2d at 587 (quotation omitted).

The presumptive sentence in this case for felony count one is a stayed sentence of 18 months. Minn. Sent. Guidelines 4.A, 5.A. The district court stayed execution of a 365-day sentence, which is a gross-misdemeanor sentence. The imposition of a gross-misdemeanor sentence for a felony conviction is a downward durational departure. *See* Minn. Stat. § 609.13; *see also State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994) (holding that imposing a gross-misdemeanor sentence for felony theft conviction is a durational departure), *review denied* (Minn. Oct. 27, 1994). “The district court may consider only offense-related factors . . . when granting a downward durational departure.” *State v. Solberg*, 869 N.W.2d 66, 69 (Minn. App. 2015), *aff’d* 882 N.W.2d 618 (Minn.

2016). To support a durational departure, the district court must determine “whether the offense was significantly less serious than the typical conduct involved in that offense.” *Id.*

Here, the district court stated that the durational departure was supported by Jenniges’s amenability to probation. The state argues that this factor does not support a durational departure. We agree. Amenability to probation is an offender-related characteristic that is unrelated to the nature of the offense. *State v. Behl*, 573 N.W.2d 711, 713–14 (Minn. App. 1998) (stating that amenability to probation has “no bearing” when considering a durational departure), *review denied* (Minn. Mar. 19, 1998). Thus, the district court abused its discretion in granting a durational departure on this ground.

Although the district court’s stated reason does not support a durational departure, this court looks to the record to determine whether sufficient evidence exists to justify the departure. *Heath*, 685 N.W.2d at 65. Jenniges argues that the departure is justified because of her remorse and the victims’ wishes. We disagree.

Remorse typically supports a downward dispositional departure because it is an offender-related characteristic. *State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016). “[A] durational departure may be granted only if a defendant’s remorse . . . bears on a determination of the cruelty or seriousness of the conduct on which the conviction was based.” *Id.* at 626. Thus, unless the remorse is “directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense,” it does not justify a durational departure. *Id.*

Nothing in the record shows that Jenniges’s remorse is related to her criminal conduct or made her conduct less serious than typically seen in these offenses. Jenniges

chose to drive her parents home after she had been drinking, drove the van into a tree, and injured her parents, with her mother sustaining very serious injuries. Jenniges's alcohol concentration was 0.189, more than two times the legal limit. On this record, we cannot conclude that Jenniges's remorse has any bearing on the seriousness of the offense.

Jenniges next argues that the victims' wishes support a durational departure. At sentencing, Jenniges's parents stated that they felt responsible for the accident and her mother said that Jenniges "should not be facing any criminal charges." The state responds that these statements do not present offense-related reasons for a departure. We agree. Initially, crime victims have "the right to submit an impact statement to the court at the time of sentencing." Minn. Stat. § 611A.038(a) (2016). A district court may consider an impact statement to support a departure if it provides adequate reasons for a departure which are "supported or corroborated by evidence in the record." *State v. Yanez*, 469 N.W.2d 452, 455 (Minn. App. 1991), *review denied* (Minn. June 19, 1991).

In this case, Jenniges's parents' statements at the time of sentencing are not offense-related reasons that lessen the impact of Jenniges's offense. We understand that Jenniges's mother believes it was a "tragic accident" and "[w]e weren't innocent victims." But nothing in the record establishes that Jenniges's offense was atypical as compared to others of the same nature, or that the victims' injuries were somehow less severe than is typical. Thus, on this record, the victim impact statements were insufficient to support a durational departure.

We understand the district court's motivation to give Jenniges an opportunity to maintain her sobriety without the burden of a felony conviction. But the district court relied

on improper factors to support a downward durational departure, and the record does not support substantial and compelling reasons for departure; thus, we conclude that the district court abused its discretion. We therefore reverse Jenniges's gross misdemeanor sentence for count one and remand to the district court for imposition of a guidelines sentence.

Reversed and remanded.