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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2041**

State of Minnesota,
Respondent,

vs.

Tiffany Lynn Lambert,
Appellant.

**Filed October 16, 2017
Affirmed
Kirk, Judge**

Anoka County District Court
File No. 02-CR-15-7349

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County
Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Rodenberg, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant pleaded guilty to one count of theft of property worth more than \$1,000
but not more than \$5,000, in violation of Minn. Stat. § 609.52, subds. 2(a)(1), 3(3)(a)

(2014), and moved for a downward dispositional or downward durational departure. The district court denied appellant's motion and sentenced her to a presumptive guidelines sentence. Appellant asks to withdraw her guilty plea alleging that it is inaccurate and argues that the district court abused its discretion when it denied her departure motion. We affirm.

FACTS

On November 10, 2015, appellant Tiffany Lynn Lambert was charged by criminal complaint with one count of theft of property worth more than \$1,000 but not more than \$5,000, in violation of Minn. Stat. § 609.52, subds. 2(a)(1), 3(3)(a). The complaint alleged that appellant stole items worth \$1,056 from a Kohl's store. Appellant pleaded guilty to the sole count of the complaint in exchange for dismissal of a felony financial transaction card fraud case. A felony plea petition was admitted into evidence. The district court questioned appellant to establish the factual basis for her guilty plea as follows:

- Q: Take you back then to November 9, 2015. You went to the Kohl's store in the City of Blaine, Anoka County; is that right?
- A: Yes, ma'am.
- Q: And you took some jewelry and clothing and you left the store without paying for it, true?
- A: Yes, ma'am.
- Q: And the value of that clothing I believe was just over a thousand dollars, true?
- A: Yes, ma'am.
- Q: Nobody gave you permission obviously to take that?
- A: No, ma'am.

The district court ordered appellant to complete a presentence investigation (PSI) and scheduled a sentencing hearing. Corrections completed appellant's PSI on August 22

without receiving input from appellant. The report noted that appellant violated the terms of her plea agreement because she failed to cooperate with the PSI and did not remain law abiding. Before sentencing, appellant was charged with another theft offense.

The PSI report described the corrections agent's unsuccessful attempts to schedule an interview with appellant. The agent was not able to speak directly to appellant until there was no longer sufficient time to complete an interview. Appellant admitted to the agent that the two telephone numbers she provided to the agent could not receive calls or voicemail messages. Appellant's criminal-history score was calculated to be 13, and the presumptive guidelines sentence was 24 months (21-28 month range). The agent recommended that appellant be sentenced to 28 months in prison.

A sentencing memorandum drafted by a dispositional advisor on behalf of appellant was also filed prior to sentencing. The memorandum described appellant's family, residential, education, employment, health, and criminal histories, as well as her past substance use and chemical dependency treatment. The memorandum concluded that mitigating factors were present to support a dispositional departure in appellant's case, including: (1) appellant's three children; (2) appellant's supportive family and long-time romantic partner; (3) appellant's recent completion of inpatient treatment, her plan to participate in outpatient treatment, and her compliance with methadone maintenance; and (4) that the charges in this case were appellant's first supervised-release violation since leaving prison on January 7, 2012. The memorandum also concluded that appellant is particularly amenable to individualized treatment in a probationary setting.

At the sentencing hearing, the state argued against departure because of appellant's long criminal history, her failure to cooperate with the PSI, and her new theft charge. Appellant's attorney stated that appellant maintained appropriate communication with her and argued that because appellant tried to schedule a PSI interview it was unfair to use her failure to attend an interview against her. Appellant's attorney also addressed the new theft charge, arguing that appellant was taking it seriously. Appellant's attorney argued that going to prison would not provide an opportunity for appellant to better herself and that appellant would be better served by remaining in the community under supervised release so that she could begin outpatient treatment and continue to improve her mental health.

Appellant's attorney argued that although appellant accepted responsibility for the offense that she was being sentenced on, it occurred because she was "out of her mind" due to anxiety related to her mother's health and due to "substance issues." Appellant also stated on her own behalf that before the offense she had not slept for a couple of days and was taking herself off of a medication in a way that she "later learned could be very, very harmful to [her] mental health." Appellant asserted that she "had a[n] out-of-body experience" and that she is sorry the theft offense happened.

Before sentencing appellant to a guidelines sentence of 28 months, the district court stated:

[Y]ou have a criminal history score of 13. This is a theft. And then according to the PSI, you got charged with a new theft as well from August 1st so it makes it very hard for the [c]ourt to find that there is a basis to depart from the sentencing guidelines. Very, very difficult.

DECISION

I. Appellant is not entitled to withdraw her guilty plea because the factual basis was sufficient to establish the value of the stolen property.

Appellant asks this court to allow her to withdraw her guilty plea to correct a manifest injustice because the district court did not elicit a sufficient factual basis to establish that the stolen property had a value of over \$1,000. “A defendant has no absolute right to withdraw a guilty plea after entering it.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But the district court must permit a defendant to withdraw a guilty plea at any time if such withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. “A manifest injustice exists if a guilty plea is not valid.” *Raleigh*, 778 N.W.2d at 94. The validity of a guilty plea is a question of law that we review de novo. *Id.*

A constitutionally valid guilty plea must be accurate, voluntary, and intelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). The appellant bears the burden of showing that his plea was invalid. *Raleigh*, 778 N.W.2d at 94. Here, appellant only challenges the accuracy of her guilty plea. For a guilty plea to be accurate, it must be established by a proper factual basis. *Theis*, 742 N.W.2d at 647. The accuracy requirement ensures that the defendant does not plead guilty to a more serious charge than he or she could be convicted of at trial. *State v. Wukawitz*, 662 N.W.2d 517, 521-22 (Minn. 2003). To satisfy this requirement, there must be sufficient facts on the record to support a conclusion that the defendant is guilty of the crime he or she is pleading guilty to. *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003).

“[T]he trial court bears the primary responsibility to advise and interrogate the defendant in sufficient detail to establish an adequate factual basis for the plea.” *Shorter v. State*, 511 N.W.2d 743, 747 (Minn. 1994). The factual basis is typically established by the district court “asking the defendant to express in his own words what happened.” *Raleigh*, 778 N.W.2d at 94; *Shorter*, 511 N.W.2d at 747 (noting preference for district court judges to ask questions to establish an adequate factual basis). “The court should be particularly wary of situations in which the factual basis is established by asking a defendant only leading questions.” *Raleigh*, 778 N.W.2d at 94; *State v. Hoaglund*, 307 Minn. 322, 326, 240 N.W.2d 4, 6 (1976).

“But the use of leading questions does not, by itself, require reversal.” *Sanchez v. State*, 868 N.W.2d 282, 289 (Minn. App. 2015), *aff’d*, 890 N.W.2d 716 (Minn. 2017). A plea may be accurate, despite a disfavored format, when a defendant’s responses to leading questions establish the elements of the crime. *See Raleigh*, 778 N.W.2d at 95-96. Additionally, “a defendant may not withdraw his plea simply because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction.” *Id.* at 94; *see also Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012) (A plea “may be supplemented by other evidence to establish the factual basis.”); *Sanchez*, 868 N.W.2d at 289 (noting that the court examines the record when faced with a deficient factual basis for a plea).

Appellant asserts that her “yes” and “no” answers to the district court’s leading questions did not support the guilty plea because her responses “lacked any specific evidence” about the value of the stolen property. Appellant argues that there must be the

equivalent amount of, or more, specific, documentary evidence in the record at a plea hearing to establish the nature and value of stolen property as is required to establish a claim for restitution. *See* Minn. Stat. § 611A.04, subd. 1(a) (2016) (“Information submitted relating to restitution must describe the items . . . of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts, if restitution is in the form of money or property.”). Appellant contends that, because a higher burden of proof is required when a court adjudicates guilt than is required when establishing restitution, the documentary evidence requirement of the restitution statute must also be met for a conviction to rest on a sufficient factual basis. This argument has no support in Minnesota law.

Appellant was asked by the district court whether the value of the stolen property was “just over a thousand dollars,” and appellant said, “Yes.” The state was not obligated to present evidence beyond appellant’s admission to support this element of the offense. Here, there was a sufficient factual basis to support a valid guilty plea, and appellant is not entitled to withdraw her plea.

II. The district court did not abuse its discretion in denying appellant’s departure motion and imposing a guidelines sentence.

Appellant argues that the district court should have stayed the presumptively executed sentence based on her particular amenability to probation. “We afford the trial court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). “A sentencing court ‘must pronounce a sentence within the applicable

range unless there exist identifiable, substantial, and compelling circumstances’ that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *Id.* at 308 (quoting Minn. Sent. Guidelines 2.D.1 (2014)). The district court may order a departure from the presumptive guidelines sentence if the case involves “substantial and compelling circumstances” to warrant the departure, but the district court is not required to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (“[T]he Guidelines state that when substantial and compelling circumstances are present, the judge ‘may’ depart.”); *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (noting that a district court must consider the circumstances of a case when deciding whether to depart, but that the presence of mitigating factors does not obligate a departure) (citing *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)). Substantial and compelling circumstances are those that make a case atypical. *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003). This court will only reverse a district court’s refusal to depart in a “rare case.” *Kindem*, 313 N.W.2d at 7.

When considering a dispositional departure, a district court may consider both offender-related and offense-related factors. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998) (citing *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995)), *review denied* (Minn. Mar. 19, 1998). When considering a durational departure, a district court is limited to consideration of offense-related factors. *Id.*

Appellant argues that the district court improperly relied on her new theft charge because “reliance on other offenses that are not part of the charge and of which the defendant was not convicted is not a permissible basis for [a] departure.” *Taylor*, 670 N.W.2d at 588; *State v. Chase*, 343 N.W.2d 695, 697 (Minn. App. 1984). But here the

district court sentenced appellant to a guidelines sentence rather than departing. See *Taylor*, 670 N.W.2d at 586 (imposing an upward durational departure); *Chase*, 343 N.W.2d at 696 (imposing an upward dispositional and durational departure). Citing *State v. Brusven*, 327 N.W.2d 591, 593 (Minn. 1982), appellant argues that “because [a] defendant’s criminal history is considered in determining the presumptive sentence, it generally would be unfair to consider that criminal history again in determining whether or not to depart.” But the *Brusven* case involved the improper imposition of an upward durational departure and does not apply here. When considering a downward dispositional departure, a district court necessarily considers a defendant’s criminal history, his or her conduct prior to sentencing, and other offender-related factors, in order to properly consider the offender as a whole. See *Behl*, 573 N.W.2d at 713.

Appellant further asserts that the district court did not conduct any “meaningful analysis” of whether the relevant factors supported a departure, and failed to consider the factors she presented in support of her motion. Appellant argues that this court must remand for resentencing because it is not possible to “conclude from the record that the district court made a deliberate decision to impose [a] presumptive sentence[] by weighing reasons for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), review denied (Minn. Apr. 16, 2002). But the district court is not required to give an explanation for its decision to impose a guidelines sentence. *State v. Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

At sentencing, based on the documents, arguments, and statements presented, the district court concluded that it was difficult to find a basis to depart from the sentencing

guidelines. The court considered factors that could have supported a downward dispositional departure if they had been substantial or compelling, such as appellant's asserted particular amenability to probation and the support of her family, but concluded that a departure was not warranted. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (finding that "[n]umerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant" to a downward dispositional departure). The court also considered factors that could have supported a downward durational departure if they had been substantial or compelling, such as appellant's implication that she is less culpable than the typical offender because of her anxiety and substance use.

The district court did not explain in detail its decision not to depart, but the court properly considered the offense committed, the circumstances of that offense, the factual basis supporting appellant's guilty plea, and the mitigating factors that she argued at sentencing and presented in the sentencing memorandum. By denying appellant's departure motion, and explaining that appellant's past and continued criminal conduct made it difficult to find a reason to depart, the district court implicitly concluded that substantial and compelling circumstances did not exist in appellant's case. Further, appellant's criminal history and new theft charge were relevant to her amenability to probation, so they were properly considered by the court before it denied appellant's departure motion on the record. Because the court declined to depart, it was not required to do more. *See Pegel*, 795 N.W.2d at 254 (noting that if a district court deliberately

considers the reasons for departure but chooses not to depart, an explanation for the denial is not required); *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984).

We conclude that the district court acted within its discretion when it denied appellant's motion for a downward departure. Because the district court did not abuse its discretion when it imposed a presumptive guidelines sentence, we affirm.

Affirmed.