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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0922**

State of Minnesota,
Respondent,

vs.

Kevin Philip Dreyer,
Appellant.

**Filed April 2, 2018
Affirmed
Smith, Tracy M., Judge**

Washington County District Court
File No. 82-CR-15-2981

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this sentencing appeal, appellant Kevin Dreyer argues that his sentence for
terroristic threats must be reversed because the district court abused its discretion when it

denied his motion for a downward durational departure. Because the evidence Dreyer cites does not compel such a departure, we affirm.

FACTS

On July 18, 2015, Dreyer was involved in a domestic dispute that ultimately led to his arrest. After Dreyer was handcuffed and seated in the back of a police car, he told one of the arresting officers something to the effect of “I am going to get a gun and kill you.” Dreyer was charged with terroristic threats, fourth-degree assault, and fourth-degree damage to property. Dreyer subsequently pleaded guilty to terroristic threats in exchange for the dismissal of the other charges. As a part of his plea colloquy, Dreyer admitted he made the statement with a reckless disregard for causing terror on the part of the officer.

The presumptive sentence for Dreyer was a stayed one-year-and-one-day sentence. *See* Minn. Sent. Guidelines 4.A (2014). At sentencing, Dreyer moved for a downward durational departure, asking for a stayed gross-misdemeanor-level sentence. The district court denied the motion, stayed imposition of sentence for two years, and placed Dreyer on two years’ probation.

Dreyer appeals.

DECISION

Dreyer argues that his sentence must be reversed because the district court “tacitly acknowledged” that he deserved less than the presumptive duration but nevertheless refused to durationally depart. We review a decision not to depart from the sentencing guidelines for an abuse of discretion. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We will affirm the imposition of a presumptive sentence when “the record shows that the

sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013). By affirming a presumptive sentence, this court is merely stating that the district court acted within its discretion. *State v. Dokken*, 487 N.W.2d 914, 918-19 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). It is the “rare case which would warrant reversal of the refusal to depart” from a presumptive sentence. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008) (quotation omitted).

When sentencing a criminal defendant, a district court must impose the presumptive sentence provided in the sentencing guidelines unless the case involves “substantial and compelling circumstances” to warrant a downward departure. *Id.* “[A] single mitigating factor may provide a substantial and compelling reason to impose a downward durational sentencing departure if it shows that the defendant’s conduct in committing the offense of conviction was significantly less serious than that typically involved in the commission of the offense in question.” *State v. Solberg*, 882 N.W.2d 618, 627 (Minn. 2016). However, “[d]urational departures must be based on the nature of the offense, not the individual characteristics of the offender.” *Id.* at 625 (emphasis omitted).

The district court, in deciding not to depart, noted that “one of the main reasons for departure” would be Dreyer’s lack of criminal history. The court noted that Dreyer had just turned 18, “and if we saw this case in Juvenile Court we’d probably have a different outcome.” Nevertheless, the court concluded that “the standards for departure are pretty

stiff. And I'm not finding particularly substantial and compelling circumstances, although I find [Dreyer's attorney's] arguments made a lot of sense and worthwhile."

Dreyer advances four arguments as to why the district court abused its discretion in refusing his motion for a downward durational departure.

First, Dreyer argues that, because he was "high on Xanax" at the time of the threat, he was "not in a normal state of mind." We reject this argument. The Minnesota Sentencing Guidelines are clear: "The voluntary use of intoxicants" is not a mitigating factor. Minn. Sent. Guidelines 2.D.3.a.3. Additionally, the Minnesota Supreme Court squarely addressed the impact that an intoxicated individual's mental state has on the mens rea requirement of terroristic threats in *State v. Rund*, 896 N.W.2d 527, 533-34 (Minn. 2017). In that case, the district court had granted a motion for a durational departure without indicating on its departure report that it had found any offense-related reasons for a departure. *Id.* at 533. The district court stated, however, that Rund's offense was less serious because of his mental state and because he was intoxicated at the time of the offense. *Id.* at 531, 533. On appeal, Rund argued that the district court's reference to mental state indicated that the fact that he committed the threat with a reckless disregard of causing terror, as opposed to a purposeful intent of causing terror, made the crime less serious. *Id.* at 533. The supreme court rejected this argument, holding that, "[b]ecause Rund's conduct fits squarely within the statute's prohibition against making threats with a reckless disregard of the risk of causing terror, his conduct was not significantly less serious than the typical case. Accordingly, Rund's 'mental state' was not a proper reason to impose a downward durational sentencing departure." *Id.* at 534.

This case presents a factually similar situation—Dreyer admitted to making the threat with a reckless disregard of the risk of causing terror and did so while he was intoxicated. As the court did in *Rund*, we similarly conclude that Dreyer’s conduct fits squarely within the statute’s prohibition against reckless threats and that his impaired mental state is not a proper reason to impose a downward durational departure.

Second, Dreyer argues that, because he made the threat after he had been placed in the back of a police car, the threat was less serious because he was incapacitated and unable to carry it out. We disagree. In *Rund*, the supreme court analyzed whether threats made on social media, which were “more exaggerated or extravagant” than they would be in other contexts, necessitated a downward departure because they were less likely to be carried out. *Id.* at 535. The court concluded that just because a threat was made in a context in which it was less likely to be seriously intended did not “support a categorical rule” that such threats were “somehow less serious than other threats.” *Id.* Rather, such an evaluation must be made on a case-by-case basis. *Id.* As in *Rund*, we conclude that Dreyer’s being handcuffed in the back of a police car and unable to immediately carry out his threat does not categorically mean that his crime was less serious so as to mandate a downward durational departure.

Third, Dreyer argues that the district court “must have recognized that this was not a typical case . . . because the court sentenced [Dreyer] to a stay of imposition rather than just a stayed felony sentence.” However, this argument ignores the text of the Minnesota Sentencing Guidelines, which states, “The Commission recommends that stays of imposition be used for offenders who are convicted of lower severity offenses and who

have low criminal history scores.” Minn. Sent. Guidelines 3.A.1.b. Dreyer met these criteria, and the district court sentenced him accordingly. However, meeting the criteria for a stay of imposition does not imply—as a matter of law—that one meets the criteria for a durational departure. Otherwise every stay of imposition would also require a durational departure. We therefore conclude that the district court’s determination that Dreyer deserved a stay of imposition does not imply that a durational departure was warranted.

Fourth, Dreyer argues that the circumstances of *Rund* present a “typical threats of violence offense,” whereas his offense was less serious. We disagree. Although *Rund* involved five threats made to multiple police officers while the defendant was at large, as opposed to one threat made to one police officer while Dreyer was handcuffed in the back of a police car, these differences do not categorically mean that Dreyer’s conduct was any less serious than a typical threats-of-violence offense. *See Rund*, 896 N.W.2d at 530 (describing threats made in that case). Unlike *Rund*, Dreyer made the threat in person, and, although Dreyer was incapable of carrying out the threat in the moment, he was perfectly capable of carrying it out after his eventual release.

Our review of the record convinces us that the district court fully and thoughtfully considered both “arguments for departure” and the “valid reasons for non-departure.” *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (quotation omitted). The district court did not abuse its discretion in concluding that Dreyer’s case lacked substantial or compelling circumstances warranting a downward durational departure.

Affirmed.