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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1427**

State of Minnesota,
Appellant,

vs.

Dominique Dreshaun Malone,
Respondent.

**Filed February 26, 2018
Affirmed
Jesson, Judge**

Dakota County District Court
File No. 19HA-CR-16-4569

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

James C. Backstrom, Dakota County Attorney, Torrie J. Schneider, Assistant County Attorney, Hastings, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Respondent Dominique Dreshaun Malone was arrested and charged with domestic assault after he placed his ex-girlfriend in a headlock during an argument about their

relationship. He subsequently entered an *Alford* plea and requested a downward departure at his sentencing hearing. With essentially only a probable-cause statement in the record providing scant details of the incident, the district court found the crime was less serious than typical and granted a durational departure motion over the state's objection. The state appeals and argues this was an abuse of discretion. We affirm.

FACTS

In December 2016, law enforcement responded to a reported domestic assault incident at the home of respondent Dominique Dreshaun Malone's ex-girlfriend, D.M. The details of the incident primarily come from a short, half-page probable cause statement. This statement explained that, when law enforcement arrived at the scene, they noticed Malone's ex-girlfriend had red marks on her neck. They spoke with her, and she stated Malone was the father of her children and that he stayed over the previous night in order to take their children to school in the morning. The following morning, Malone entered her bedroom to discuss their relationship, but she told him that she did not want to talk. In response, Malone grabbed her and put her in a headlock, making it difficult for D.M. to breathe and preventing her from screaming. D.M. stated that she believed Malone was going to kill her. During the struggle, Malone's body hit a closet door with enough force to unhinge it and have it fall to the floor. A neighbor heard the commotion and called 9-1-1. D.M. also sent a text message to that neighbor during the incident, stating that she believed Malone was going to kill her and asked the neighbor to call 9-1-1. Police arrested Malone and charged him with domestic assault by strangulation under Minnesota Statutes section 609.2247, subdivision 2 (2016).

For purposes of a pre-trial evaluation, a probation officer spoke with D.M. She explained that Malone was her ex-boyfriend and that the relationship ended almost a year prior to this incident. They have three children together, and all of them were at home during the altercation. She told the investigating agent that during the struggle, Malone stated, “I don’t care if I live anymore. I don’t care if I go to jail. I’m not stopping. You don’t love me anymore.” In her opinion, Malone was under the influence of chemicals during the incident. She also mentioned a previous incident where Malone was charged with domestic assault after he grabbed her in front of their children and she sustained marks on her body.

Malone filed a petition to plead guilty in April 2017.¹ At the plea hearing, Malone clarified that he was entering an *Alford* plea, and the court accepted the plea. The district court ordered a presentence investigation and Malone was interviewed as part of that investigation. Malone provided his version of events, stating that he slept over at his ex-girlfriend’s house and that she gave him mixed messages regarding their relationship. He admitted that he went into her room to talk to her and that he tried to hold her and express his love for her. He denied any assaultive behavior, stated that D.M. completely misrepresented what occurred, and that while she was subsequently apologetic, she refused to recant her story. Malone explained that he had problems with alcohol, marijuana, and

¹ Just prior to Malone filing a petition to enter a guilty plea, the state sought to amend the complaint with an additional charge: domestic assault – causing fear of immediate bodily harm or death pursuant to Minnesota Statutes section 609.2242, subdivision 1(1) (2016). However, before any action could be taken on that proposed amended complaint, Malone pleaded guilty to domestic assault strangulation.

Percocet in the past. The presentence investigation report stated that Malone's support system with his mother, his job, and his parenting, were all areas of strength. The presentence investigation report recommended a stay of imposition and that Malone be placed on probation for zero to three years. The presumptive sentence was 15 months, stayed.

In July 2017, a sentencing hearing was held. The state argued that the presentence investigation report recommendations should be followed.² Malone argued for a durational departure and to be sentenced for a gross misdemeanor instead of a felony as allowed under Minnesota Statutes section 609.13, subdivision 1(1). He contended that his offense was less serious than the typical offense, pointing out that he maintained his innocence, and that even if some altercation happened, all the evidence pointed to it being very minor. Malone argued that the victim's side of the story was very suspicious, as she did not cooperate completely with police, she did not let law enforcement photograph her, and there are some parts of her comments to law enforcement that lacked supporting evidence in the record—such as the door being broken. Malone pointed out that his relationship with his ex-girlfriend was eight-years long and there was little indication the relationship had a violent aspect.³ Malone personally spoke at the sentencing hearing, took full responsibility for the

² The district court's departure report stated that the state did not object to the departure, however this is not supported by the record. The state did in fact object and argued against Malone's motion at the sentencing hearing.

³ Malone had a prior disorderly conduct conviction in an incident involving his ex-girlfriend.

incident occurring, but denied it being abusive or as D.M. portrayed it. He explained that he is not an abusive person.

The district court granted Malone's motion to sentence the crime as a gross misdemeanor. The court sentenced Malone to one year, but stayed the execution of the sentence for two years. The court acknowledged that it reviewed the presentence investigation report and examined the complaint in detail. The court made a finding that "this crime is less onerous than the usual felony domestic assault by strangulation." The court emphasized that details in the record were scarce regarding the struggle, specifically to what degree, if any, Malone's hands were on his ex-girlfriend's neck. The court explained:

[The record] didn't have a lot of detail on specifically how the airway was impeded, except for that she had difficulty breathing and could not scream because it was hard to breathe. It talked about a headlock, but it didn't necessarily talk about how Mr. Malone's hands were on her neck; although, the officers did observe red marks around her neck, but there's not a lot of specifics as to where those marks were and to what extent, if they were on both sides of the neck, or one side of the neck. Which, to the Court, makes a difference in whether the crime was less onerous than usual as to the information that's in the complaint, since we have no other victim impact information outside of what was delivered at the bail argument.

The district court also noted that Malone had successfully completed probation for a previous misdemeanor, and it stated this was "another thing that the Court looks at as well." Lastly, the court found that Malone was remorseful and expressed responsibility to some extent, but noted that "the Court doesn't need to find those types of factors to warrant a departure."

In the district court's departure report, the reasons for departure were stated as: crime less onerous than usual; shows remorse/accepts responsibility; and amenable to treatment. The state appeals.

D E C I S I O N

The state contends that the district court erred by granting the durational departure. It argues that the district court's decision was erroneous because (1) there were insufficient facts in the record to support the district court's finding that the offense was less serious than typical and (2) the district court improperly relied on Malone's remorse, responsibility, and amenability to treatment. The second issue only needs to be reached if the district court's finding that the offense was less serious than typical was in error, because, even if a district court relied on improper factors, this court may still affirm on the less-serious-than-typical reasoning. *See State v. Rund*, 896 N.W.2d 527, 532-33 (Minn. 2017) (stating that when the district court gives improper or inadequate reasons for a downward departure, the appellate court may independently review the record to determine if there are alternate grounds to support it). We therefore address the less-serious-than-typical issue first.

The state argues that the district court abused its discretion when it granted Malone's motion for a downward-durational departure on grounds that the crime was less serious than the typical felony-domestic-assault-by-strangulation case. This court will reverse sentencing decisions only for an abuse of discretion. *State v. Leja*, 684 N.W.2d 442, 448 (Minn. 2004). An abuse of discretion occurs when the district court's reasons for departure are "improper or inadequate." *Rund*, 896 N.W.2d at 532. And "as long as the record shows

the sentencing court carefully evaluated all the testimony and information presented before making a determination,” this court will not interfere with the district court’s decision. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (internal quotation omitted).

The district court’s reasoning here is supported by the record. The court framed its justification for granting the downward departure based on the seriousness of the crime. This was proper. See *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012) (“Requests for durational departures require the district court to consider whether the conduct involved in the offense of conviction was significantly more or less serious than the typical conduct for that crime.”), *review denied* (Minn. Feb. 27 2013). In making its decision, the district court emphasized the scarcity of details in the record. The court noted that the record does not make clear whether Malone’s hands ever touched D.M.’s neck. Nor does it describe where the red marks were on Malone’s neck. The record supports this reasoning—the half-page probable cause statement contains minimal details regarding the offense. The district court carefully reviewed the record and determined that with the details it did know—that an unclear struggle occurred, Malone placed the victim in a headlock, no injuries were recorded, and the victim was able to text a neighbor in the midst of the incident—the crime was less serious than the typical felony-domestic-assault-by-strangulation case. This was not an abuse of discretion.

The state argues that relying on the lack of detail in determining the crime was less serious than typical is an abuse of discretion as it “essentially made a finding from silence.” Or in other words, the state argues the district court improperly inferred the crime was less serious than typical based on a lack of detailed information. But the state does not cite to

any legal authorities to establish this was improper. Nor does the state explain how the district court abused its discretion by only relying on the minimal facts it had, while emphasizing the facts it did not have. This court's role is both deferential and limited when reviewing sentencing decisions. In *Williams v. State*, the Minnesota Supreme Court stated that the district court must state its reasons supporting the departure, the reviewing court must examine the record to determine if the reasons justify the departure, and if justified, then the departure will be allowed. 361 N.W.2d 840, 844 (Minn. 1985). Here the district court stated its reason that the crime was less serious than typical, that reason is supported by the record, and the reason justifies the departure. Both parties agree that there is little caselaw informing courts of what is typical in assault-by-strangulation cases.⁴ And there is nothing on review that suggests the district court abused its discretion in its finding.

And we observe there is some responsibility on the part of the state for the lack of details in the record. The state did not object to the *Alford* plea, and it declined to ask any

⁴ Malone cites to a series of cases involving assault-by-strangulation charges where there were circumstances that were more violent and concerning. See, e.g., *State v. Johnson*, 867 N.W.2d 210, 213 (Minn. App. 2015) (victim was strangled to the point it affected her vision), *review denied* (Minn. Sept. 29, 2015); *State v. Simmons*, No. A07-0893, 2008 WL 3288141, at *1 (Minn. App. Aug. 12, 2008) (victim was spitting, coughing, and vomiting after she was strangled), *review denied* (Minn. Oct. 21, 2008); *State v. Benson*, No. A06-2439, 2008 WL 1799294, at *1 (Minn. App. Apr. 22, 2008) (victim was strangled to the point she could not speak), *review denied* (Minn. June 25, 2008). However, none of those cases included sentencing as an issue on appeal and are unpersuasive. See, e.g., *Johnson*, 867 N.W.2d 210 (addressing whether the district court must make an express finding that there is a strong probability the defendant would be found guilty in a *Norgaard* plea); *Benson*, 2008 WL 1799294, at *6 (addressing whether the district court abused its discretion by admitting past domestic abuse evidence and by convicting him of a lesser-included offense); *Simmons*, 2008 WL 3288141, at *1 (addressing whether the district court abused its discretion by admitting certain evidence and if there was prosecutorial misconduct).

additional factual questions at the plea hearing. It is somewhat disingenuous to now point to the lack of details as a bar to the determination that, in light of the record in front of the district court, the crime was less serious than typical.

Because the district court did not abuse its discretion in determining the crime was less serious than typical, there are proper grounds to support its decision to grant the motion for a downward departure. Therefore, we do not reach the state's argument that the district court improperly relied on Malone's remorse, responsibility, and amenability to treatment. *See Rund*, 896 N.W.2d at 532-33.

Affirmed.