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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1685**

State of Minnesota,
Respondent,

vs.

Hakeem Manuel Rochao,
Appellant.

**Filed September 10, 2018
Affirmed
Ross, Judge**

Stearns County District Court
File No. 73-CR-17-2818

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Stauber,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Hakeem Rochao pleaded guilty to first-degree assault after he punched two teeth from his girlfriend's mouth and wrenched so many fistfuls of hair from her head that he rendered her nearly bald. Rochao moved for a downward dispositional departure at sentencing. The district court denied the motion. Rochao appeals, arguing that the district court erred because he is particularly unamenable to incarceration as is shown by his bouncing in and out of prison. Because chronic recidivism is not a factor favoring a downward dispositional departure, we affirm.

FACTS

Rochao pushed his girlfriend, who was the mother of three children with Rochao, to their basement floor during an argument. She begged him not to hit her. She told him to leave or she would call the police, and she headed outside. Rochao followed. He knocked her to the ground, breaking her phone. He kicked her repeatedly. Then he punched her in the head ten to fifteen times and ripped handfuls of hair from her head. She escaped.

Missing two teeth, covered in blood, and nearly bald, she ran to a neighbor's for help. Rochao fled. Police found him covered in blood with strands of hair on his socks. They arrested him and the state charged him with first-degree assault. Rochao pleaded guilty.

During the presentence-investigation process, Rochao underwent two psychological assessments of his risk to reoffend. He scored poorly on both. The first test, the Ontario Domestic Abuse Risk Assessment, measures the risk of future assaults. Only six percent

of domestic-violence offenders fall into the high-risk category with a score of seven or higher. Rochao scored a ten. The second test, the “Level of Service/Case Management Inventory Assessment,” rated Rochao’s risk factors poorly in all categories except one. Rochao told the presentence investigator that he was motivated to seek professional help for his mental-health and anger-management problems, which, according to Rochao, resulted from his difficult upbringing. He said that he was born in the Philippines, abandoned by his parents, and ultimately discovered by an alcoholic United States sailor who brought him to America and physically disciplined him excessively. The investigator did not believe that Rochao sincerely wanted psychological help.

Rochao moved for a downward dispositional departure at sentencing, seeking probation instead of his presumptive prison sentence. He claimed that he was ashamed of himself and wanted to change for his children. The district court considered the presentence-investigation report and listened to Rochao’s testimony, his attorney’s argument, and the prosecutor’s argument. The district court denied Rochao’s motion and imposed the presumptive sentence of 98 months in prison, concluding that “there [were] no substantial and compelling reasons to grant [Rochao] a departure.” The district court reasoned that Rochao had “been in the system for a long time and . . . refused to take help when help ha[d] been offered” and that the only way the court could ensure that Rochao’s girlfriend would not be a victim again at Rochao’s hands was to execute the presumptive sentence.

Rochao appeals.

DECISION

Rochao argues that the district court improperly denied his motion for a downward dispositional departure. We review a district court's decision not to depart from the sentencing guidelines for an abuse of discretion. *State v. Stempfley*, 900 N.W.2d 412, 417–18 (Minn. 2017). A district court abuses its discretion when its decision is premised on legal errors or clearly erroneous facts. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Departures from a presumptive sentence, which “are discouraged and are intended to apply to a small number of cases,” may occur “only when there are ‘identifiable, substantial, and compelling circumstances to support a departure.’” *Id.* (quoting Minn. Sent. Guidelines 2.D.1).

The kind of “substantial and compelling circumstances” necessary to depart from a presumptive sentence depend on whether the departure is dispositional or durational. *Id.* Durational departures are based on the seriousness of the offense, and dispositional departures are based on the defendant's characteristics that show whether he is “particularly suitable for individualized treatment in a probationary setting.” *Id.* at 623 (quoting *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981)). We have no difficulty here concluding that the district court acted well within its broad sentencing discretion when it rejected Rochao's motion for a downward dispositional departure.

A district court answering a motion for a dispositional departure must deliberately compare factors for departing against factors for not departing. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). Some factors a district court may consider include a defendant's age, prior record, remorse, motivation to change, cooperation, attitude in court,

and unamenability to incarceration. *State v. Soto*, 855 N.W.2d 303, 308–09 (Minn. 2014); *State v. Hennessy*, 328 N.W.2d 442, 443 (Minn. 1983); *State v. Wright*, 310 N.W.2d 461, 463 (Minn. 1981).

Rochao argues that he is particularly amenable to probation and that he is particularly unamenable to incarceration. The district court found otherwise. We review findings of fact for clear error. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). Rochao relies primarily on *Wright*, where the supreme court upheld a downward dispositional departure because the defendant, who had no criminal history, was particularly unamenable to incarceration and particularly amenable to individualized treatment in a probationary setting. 310 N.W.2d at 462–63. But the *Wright* court was being asked to affirm the district court’s finding that the defendant was particularly amenable to probation, not to overturn it, and our standard of review is deferential. And unlike the defendant in *Wright*, Rochao has a lengthy criminal history of violent crimes, two risk assessments that put him at a high risk of reoffending, nothing in his record suggesting he risks being victimized in prison, and no recommendation from any psychiatrist supporting probation.

We reject Rochao’s legally and logically unsupported proposition that his history of recidivism favors placing him on probation. Taken to its reasoned end, the proposition is self-contradictory, because it also supports the conclusion that Rochao is unamenable to probation in that he continues to commit violent crimes despite his having been placed on probation multiple times before. The proposition is especially flawed here, where one of the reasons the district court rejected the departure motion was to protect Rochao’s victim

from more victimization. Rochao cites nothing in the record to challenge the district court's finding that imprisoning him is the "only way" to protect her from him.

We similarly reject Rochao's argument that the district court focused exclusively on the extent of the harm he caused his victim. His premise is false. In addition to the harm Rochao caused, the district court also focused on Rochao's repeated failure to avail himself of the rehabilitative aspects of probation:

You do need help. You've been on probation. You've been involved in probation for a long, long time. You've been in the system for a long time and you've refused to take help when help has been offered. And I understand sometimes people just refuse to take help. But at this point the only way I can insure that this victim is not a victim again from your hands or that the children don't have to – even though they maybe weren't present, it's their mother. They know things are going on and things are going wrong. They can sense it even if they are three, two, and one. They do know. They can sense things.

The Court is going to find that there are no substantial and compelling reasons to grant you a departure. The only way that this Court can guarantee that this victim is safe is to have you in prison.

Although we disagree with Rochao that the district court failed to "deliberately compare" the factors for departing against factors for not departing, as it is required to do, *Curtiss*, 353 N.W.2d at 264, we observe that this is a somewhat arguable case only because of the cursory nature of the district court's analysis. The district court's discussion of Rochao's argument was brief; but our review of the brief discussion in the context of the entire record affords us bare ground to discern the district court's reasoning and infer that it deliberately compared factors weighing both for and against probation.

Affirmed.

A handwritten signature in blue ink, appearing to read "Kevin G. Row". The signature is fluid and cursive, with a large, stylized "K" and "R".