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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1742**

State of Minnesota,
Appellant,

vs.

Layne Allen Gerhardson,
Respondent.

**Filed May 7, 2018
Affirmed
Cleary, Chief Judge**

Kandiyohi County District Court
File No. 34-CR-17-150

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

Shane D. Baker, Kandiyohi County Attorney, Aaron P. Welch, Assistant County Attorney,
Willmar, Minnesota (for appellant);

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant
Public Defender, St. Paul, Minnesota (for respondent)

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

UNPUBLISHED OPINION

CLEARY, Chief Judge

The state appeals from a sentence imposed on respondent Layne Allen Gerhardson,
arguing that the district court abused its discretion in granting respondent's motion for a

downward-durational departure. Because the record supports the district court's decision, we affirm.

FACTS

On February 9, 2017, respondent walked into the victim's house, held him by the throat against the refrigerator, displayed a tire iron, demanded twenty dollars he was owed, demanded another ten dollars, and left after the victim gave him the twenty dollars. On February 15, respondent was charged with two counts of first-degree aggravated robbery—dangerous weapon and second-degree assault—fear.

At trial, the victim testified that during the incident, respondent did not swing the tire iron at him but instead “just showed it” to him. The victim also testified that he did not want respondent to be punished. The jury found respondent guilty of: (1) attempted first-degree aggravated robbery—dangerous weapon; (2) attempted first-degree aggravated robbery—bodily harm; (3) second-degree assault; (4) attempted simple robbery; (5) fifth-degree assault—harm; (6) fifth degree assault—fear; and (7) attempted theft.

At sentencing for respondent's attempted first-degree aggravated-robbery conviction, the district court stated that it had “misgivings” about the penalty and would be open to considering a motion for departure. The district court continued sentencing so respondent could file a written motion for departure. In ruling on the motion at the second sentencing hearing, the district court noted that the victim testified that he did not want respondent to be punished and reasoned that the victim “didn't feel particularly threatened.” The district court also distinguished respondent's conduct with a tire iron from a recent incident at a convenience store involving strangers with loaded guns.

The district court imposed a downward-durational departure from the presumptive 34-month sentence, finding:

First, the victim himself told us in court under oath he did not feel threatened, he did not want further consequences and I take that quite seriously. Second, I do see this case as being different where large amounts were involved, lives were more seriously threatened. I just don't see [these cases the] same

The district court sentenced respondent to a 21-month term with 92 days of credit for time served. This appeal follows.

D E C I S I O N

We review a district court's decision to depart from the presumptive sentencing guidelines for an abuse of discretion. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002). A district court abuses its discretion when its reasons for departure are "improper or inadequate and there is insufficient evidence of record to justify the departure." *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). If a district court's reasons for supporting a departure are stated on the record, a reviewing court "will examine the record to determine if the reasons given justify the departure. . . . If the reasons given justify the departure, the departure will be allowed." *Id.*

The state contends that the crime was not committed in a less serious manner than a typical attempted first-degree aggravated robbery because the crime did not involve a less serious threatening of life and the amount of money involved is immaterial. We hold that the record supports the district court's first basis for departure but agree that the district court's second basis for departure is improper.

“The Minnesota Sentencing Guidelines promote uniformity, proportionality, and predictability in sentencing.” *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015); *see also* Minn. Sent. Guidelines 1.A. (2016). A district court may grant a downward-durational departure only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1. (2016); *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). “A durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *Solberg*, 882 N.W.2d at 623. “[T]o be the basis for a downward departure, a factor must tend to excuse or mitigate the offender’s culpability for the offense.” *State v. Esparza*, 367 N.W.2d 619, 621 (Minn. App. 1985). A single mitigating factor may justify a departure if it is compelling. *Solberg*, 882 N.W.2d at 624-25.

The district court’s first stated reason for departure is supported by the record. The district court noted that the victim did not feel particularly threatened when respondent displayed the tire iron in distinguishing the offense with a recent robbery involving strangers with loaded guns. The district court’s decision based on offense-related factors such as the weapon used and threat involved was proper.

However, the district court’s second stated reason for departure was improper. In *State v. Bauerly*, this court held that the value of property is a relevant factor to consider in imposing a durational departure for a felony theft conviction. 520 N.W.2d 760, 763 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). The court cited the range of property values listed in the statute in concluding that the respondent had stolen property valued in the lower range. *Bauerly*, 520 N.W.2d at 763. Here, the robbery statutes do not contain

any ranges for the value of property taken. See Minn. Stat. §§ 609.24, .245 (2016). The district court's sentencing departure based on the amount of money taken was improper. But because the district court's substantial and compelling reasons justify the departure, that is, the weapon used and the threat involved, we affirm the district court's decision.

The state also contends that the district court erred by referring to the victim's trial testimony at sentencing. Because sentencing departures must be based on the record and testimony is part of the record, the district court did not err in relying on the victim's trial testimony. The record here justifies the downward-durational departure. The district court did not abuse its discretion.

Affirmed.