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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0072**

State of Minnesota,
Appellant,

vs.

Tatum Jacob Hermann,
Respondent.

**Filed September 10, 2018
Reversed and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CR-17-14636

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

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

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Tatum Hermann responded to the online posting of a purportedly 18-year-old female prostitute to arrange for a sexual encounter, and he asked the female (actually a

police decoy) her age and learned that she was only 15. He then asked about her appearance and bra size. An hour later, Hermann sent a message to the professedly 15-year-old girl to schedule a sexual encounter with her, and he drove to the address she gave him. Hermann pleaded guilty to hiring or offering or agreeing to hire for sex a person whom he reasonably believed was under age 16. The district court departed downward durationally from the presumptive sentence, reasoning that Hermann committed the offense in an atypical manner because he had not initially set out specifically seeking a child for sex. Because ascertaining a child's age after, rather than before, initially contacting an ostensibly 18-year-old prostitute to arrange for a sex encounter is not a circumstance that made the offense significantly less serious, it is not a substantial and compelling reason to depart from the presumptive sentence. We therefore reverse and remand for resentencing.

FACTS

In April 2017, police officers working a sting operation in Maple Grove posted an online advertisement posing as a prostitute named Rayann. The post ended, "Poster's Age: 18." Thirty-nine-year-old Tatum Hermann sent a text message responding to the post and exchanged messages with "Rayann." After several messages during which the two discussed sex acts and price and Rayann asked Hermann's age, Hermann asked Rayann her age, and Rayann responded, "im 15 I hope that's ok casue I don't want any truble if you come see me." Hermann immediately replied, "It's fine" and asked to learn more about her. They exchanged more messages about Rayann's physical appearance, including her bra size.

An hour after Hermann asked for Rayann's age and learned that he was conversing with a 15-year-old, he sent text messages asking when she could be available and where he should go for a sex encounter with her. Rayann directed Hermann to a Walmart parking lot, and he went there, sending Rayann a text message announcing he had arrived. Rayann then gave Hermann an apartment address. Hermann urged her to meet him at her door naked. He went to the apartment carrying a box of condoms and the agreed-upon \$100 in cash. Police greeted him.

The state charged Hermann with hiring or offering or agreeing to hire a person whom he reasonably believed was under age 16 for sex, violating Minnesota Statutes, section 609.324, subdivision 1(b)(3) (2016). Hermann pleaded guilty. He then moved the district court to depart downward from his presumptive 18-month stayed prison sentence "based upon the fact that his conduct was less serious than that typically involved in the commission of this crime." Over the state's objection, the district court granted the motion, reasoning as follows:

[T]his is less serious than the typically charged crime of this nature. I do think it is relevant that you weren't going out specifically looking for an underage individual to engage in this.

....

I would also note that this was a sting operation and there was no minor child that was actually at risk in this case

....

As I said, I think that this case is different because you weren't seeking out an individual who was underage, and for that reason I am departing.

The state appeals.

DECISION

The state contests the district court’s downward departure from Hermann’s presumptive, 18-month stayed prison sentence—a departure that reduces Hermann’s felony conviction to a gross-misdemeanor. A district court must impose the presumptive sentence framed by the sentencing guidelines unless “substantial” and “compelling” circumstances support departing from that sentence. Minn. Sent. Guidelines, II.D.1 (2016). Qualifying departure circumstances are those that make the offense significantly less serious than the usual offense in that they “tend to excuse or mitigate the offender’s culpability.” *Id.* at II.D.3.a.(5) (2016). A durational departure must rest on some significant anomaly in the circumstances of the offense itself and not on the defendant’s personal characteristics. *See State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016). Although we afford district courts great deference in sentencing, the district court has no discretion to depart from a presumptive sentence for reasons that are either improper or inadequate. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). We agree with the state that the district court abused its discretion by departing downward on the theory that Hermann was not initially “seeking out an individual who was underage.”

We observe first that the record only faintly supports the district court’s factual premise that Hermann was not “going out specifically looking for an underage” sex object. It is true that the posting to which Hermann responded represented the prostitute’s age to be “18.” But it is certain that Hermann either did not notice the posted age or he did not accept it as true. We know this because, early during the initial text-message exchanges about potential sex acts and the price for performing them, Hermann specifically asked

Rayann her age. He would not have asked her age had he seen and trusted the age-18 representation. And when Rayann replied that she was only 15 and that she “hope[d] that’s ok,” Hermann immediately responded, “It’s fine Tell me about u.” This early inquiry into Rayann’s age and Hermann’s immediate, express approval and follow-up inquiries and discussion about her appearance undercut the district court’s assessment that he did not begin his prostitute search seeking a juvenile.¹

We think that, in fact, responding to a purportedly 18-year-old prostitute’s post and inquiring early about her age, and immediately approving upon learning he was interacting with a 15-year-old girl, establish Hermann’s quest for a youthful prostitute generally and a child prostitute specifically. The district court construed this communication about Rayann’s age instead as a change in events, telling Hermann, “[T]hrough the course of the texts after you were kind of interested the presentation of facts changed and you didn’t act accordingly and say, wait, no.” But the record does not suggest that the revelation of Rayann’s age can be fairly described as a course change, since Hermann never assumed that Rayann was actually 18 despite the representation in her post. We have reviewed the

¹ Our understanding of the actual communication is sketchy, pieced together from the record. No transcription of the text exchange appears in the record on appeal, but the district court and the parties discussed it, characterized it, and quoted portions of it in various places in the record. The complaint also describes the text exchange and quotes from it, and the district court expressly referenced the description of the text exchange described in the complaint during its direct colloquy with Hermann during Hermann’s plea hearing. See *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (“The record also contains a copy of the complaint and defendant, by his plea of guilty, in effect judicially admitted the allegations contained in the complaint.”). We have formed our understanding of the text-exchange details based on the undisputed quotations, the undisputed characterizations, and the criminal complaint.

limited record and conclude that it cannot support the implication that Hermann was seeking an adult prostitute and only later faced an unanticipated change to a 15-year-old.

This observation frames how we measure the significance of the manner in which Hermann learned that Rayann was 15. “A downward durational departure is justified only if the defendant’s conduct was *significantly* less serious than that typically involved in the commission of the offense.” *Solberg*, 882 N.W.2d at 624 (emphasis added and quotation omitted). The offense as defined by statute is the hiring, or the offering, or the agreeing to hire for sex a person reasonably believed to be younger than 16. Minn. Stat. § 609.324, subd. 1(b)(3). The purportedly diminishing circumstance is only that Hermann inquired about and learned Rayann’s age shortly after, rather than before, he responded to the post. We cannot say that this component of Hermann’s behavior carries any meaningful, mitigating significance in relation to the offense described by statute. The district court concluded only that the cited circumstance made Hermann’s offense “less serious,” not *significantly* less serious. And we can articulate no practically relevant difference in seriousness between one offense in which an offender initially seeks a 15-year-old child as his sex object and this offense in which the offender solicited a purportedly 18-year-old sex object but quickly inquired about age and immediately returned to the sexual topic when he learned that he had found a 15-year-old sex object. We believe that the district court rightly did not describe any difference in seriousness as significant because we hold that, as a matter of law, the circumstance identified did not make Hermann’s offense significantly less serious.

Our holding is bolstered by the timing of the circumstance in relation to the timing of the primary acts constituting the criminal behavior. Although it may be accurate to say that Hermann began his solicitation when he initiated the first contact with Rayann, his primary criminal behavior occurred an hour later, well after he had learned of Rayann's age. That is when he reinitiated contact with her believing she was 15 years old in order to arrange to meet her for a paid sexual encounter. He then confirmed the agreement by driving to the specified location to complete the money-for-sex transaction. So although Hermann sent his first communication without expressly seeking a child, this cannot be said of his later and more essential communication when he specifically arranged a meeting with her for paid sex. Given the severity of the offense of contacting a presumably 15-year-old girl to arrange for paid sex with her, Hermann's culpability is diminished only slightly, if at all, by the fact that he learned her age only after he first responded to the post.

Because the circumstance surrounding Hermann's initial contact with Rayann is not a circumstance that makes the offense significantly less serious, the district court did not identify a substantial and compelling reason why the departure sentence is more appropriate than the presumptive sentence. It therefore identified no legally proper basis to depart. When a district court gives improper or inadequate reasons for a downward departure, we may independently review the record to determine if alternative grounds support a departure. *Rund*, 896 N.W.2d at 532–33. Hermann does not identify any alternative ground, and we see none in the record. We must reverse.

We add that our result is consistent with our recently published opinion in *State v. Dentz*, which holds, “When a person solicits a minor to engage in prostitution, in violation

of Minn. Stat. § 609.324, subd. 1 (2016), the fact that the person did not set out specifically seeking a minor is not a proper ground for a durational sentencing departure.” __ N.W.2d __, __ No. A18-0468 slip op. at *1 (Minn. App. Aug. 27, 2018). Of course the district court was not aware of our holding in *Dentz*. But we are bound to apply the holding here. See *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (reiterating that this court “is bound by supreme court precedent and the published opinions of the court of appeals”). Based on our analysis and, independently, based on the holding in *Dentz*, we reverse and remand for resentencing.

Reversed and remanded.

A handwritten signature in blue ink, appearing to read "Kevin G. Rose". The signature is fluid and cursive, with the first name "Kevin" and last name "Rose" clearly distinguishable.