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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0078**

State of Minnesota,
Appellant,

vs.

Benson Wahagi Mwangi,
Respondent.

**Filed September 24, 2018
Affirmed
Bratvold, Judge
Dissenting, Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-17-7186

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)

James H. Gempeler, North Star Criminal Defense, St. Paul, Minnesota (for respondent)

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

UNPUBLISHED OPINION

BRATVOLD, Judge

The state appeals from respondent Benson Wahagi Mwangi's gross-misdemeanor sentence for agreeing to hire a minor for sexual contact under Minn. Stat. § 609.324,

subd. 1(c)(3) (2016). The district court granted respondent's motion for a downward durational departure after he pleaded guilty. On appeal, the state argues that the district court should have imposed a felony sentence in accordance with the Minnesota Sentencing Guidelines. Because the district court did not abuse its discretion in determining that Mwangi's offense was significantly less serious than the typical offense, we affirm.

FACTS

On November 1, 2016, Minnetonka police officers conducted an undercover prostitution operation at an apartment. Police posted an advertisement on Backpage.com as a 19-year-old male offering sexual services. Mwangi responded to the advertisement via text message, stating, "I think you are hot" and asking for oral sex. A decoy officer replied to Mwangi via text message, stating, "suck dick \$50." Mwangi responded, "Located?"

After giving a location, the decoy texted, "im alittle (*sic*) younger [than] my add u cool with [that]," and then texted that he was "almost 17." Mwangi responded by asking for a photo, but the decoy declined. At one point, Mwangi texted, "But can I get a face pic first. I'm feeling skeptical. coz of your age...please." The decoy refused and Mwangi texted, "Ok. Can I see your dick pic?" Later text messages indicated that Mwangi was on his way. When Mwangi arrived at the location provided, police arrested him. Police found \$5 in cash in Mwangi's possession, along with a gift card and the cell phone linked to the text conversations.

The state charged Mwangi with one count of agreeing to hire an individual, whom he reasonably believed to be under the age of 18 years, but at least 16 years, to engage in sexual contact, in violation of Minn. Stat. § 609.324, subd. 1(c)(3) (2016).

Mwangi pleaded guilty without any agreement on his sentence. After waiving his constitutional rights, Mwangi admitted that he responded to an online advertisement and, in text messages, agreed to have sexual services performed in exchange for cash. Mwangi also admitted that at the time he agreed to pay for sexual acts, he had reason to believe that the minor involved was 17 years old, even though the advertisement initially indicated that he was 19 years old.

The district court ordered a presentence investigation (PSI) report and a psychosexual evaluation. The PSI noted that the guidelines sentence was a stay of execution for one year and one day based on a criminal history score of zero and a severity level of three. The PSI included Mwangi's post-*Miranda* statement to police that he wanted the person he contacted to inspect the bumps on his penis, that he had been online to find a massage therapist when the Backpage.com advertisement appeared, and that he had not understood the slang used in the text conversation. The PSI also stated that Mwangi admitted that he agreed to meet a male under 18 years old for a "naked massage." The PSI recommended a gross-misdemeanor sentence because Mwangi "has accepted responsibility and expressed a willingness to comply with any condition imposed by the Court."

At sentencing, the state asked the district court to stay imposition of the sentence for three years with 60 days in the workhouse. The state argued a downward durational departure was not warranted because, in Mwangi's statements to police, he did not take responsibility for his crime and because his crime was not less onerous "than any other one

of these cases.” The state explained the admitted facts were “the same thing we see with every one of these cases.”

Mwangi argued in favor of the recommended departure. Initially, he contended the PSI showed his remorse. He also claimed the PSI and psychological evaluation questioned whether he understood what was happening, based on evidence that he had only \$5 in his pocket rather than \$50. Mwangi’s attorney argued that, after Mwangi completed “john” programing, he had “learned his lesson and is remorseful for his actions and how they contributed to this side of our society that he really didn’t understand.”

Mwangi’s attorney also argued that his conduct was less serious than the typical offense, in part, because the advertisement described a 19-year-old male followed by text messages revealing a younger age. Although this did not excuse the wrongdoing, Mwangi’s attorney argued that, “in the scheme of these type of offenses,” Mwangi’s offense was less serious given the sting operation and the lack of an “actual victim.”

The state briefly replied, noting Mwangi had \$5 in cash plus a gift card in “an unknown amount” when he was arrested. The state also replied the statute was “designed for sting operations.” The state added, “There is never an actual victim on these type of cases under this statute as it’s charged.”

The district court granted Mwangi’s motion for a downward durational departure. The district court determined Mwangi’s offense was less serious than the typical offense, first, because Mwangi did not have enough cash to follow through with the transaction, and second, because there was no evidence that the age of the victim was an important

factor to him. The district court reasoned that “the age makes this a felony” and the decoy twice mentioned that he was almost 17 years old before Mwangi responded.

The district court also commented on offender-based factors that were supported by the record, including that Mwangi has a clean criminal record, a supportive wife, friends, church members, business partners, and other community support. The district court stated the “*Trog*” factors favored a departure and some caselaw “allows it to be used for durational.” And the district court noted that the probation and psychological reports recommended Mwangi for probation, but “that’s not a basis for a downward durational departure.”

The district court found “noncredible” Mwangi’s assertion that he did not understand the sexual purpose of the text messages and attributed Mwangi’s claim to his religious beliefs. The district court also specifically found that Mwangi showed remorse after attending the Breaking Free program. The district court concluded that a felony sentence “is out of proportion to this offense” and imposed a stayed sentence of 365 days in the Hennepin County Workhouse. The state appeals.

D E C I S I O N

We review a district court’s decision to depart from the presumptive guidelines sentence for abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A sentencing court abuses its discretion “when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure.” *Id.*

“Because the guidelines’ goal is to create uniformity in sentencing, departures are justified only in exceptional circumstances.” *Id.* at 625. The guidelines provide that a

district court must impose a sentence within the prescribed range “unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2016). Substantial and compelling circumstances for a durational departure “demonstrate that the ‘defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.’” *State v. Leja*, 684 N.W.2d 442, 450 (Minn. 2004).

In granting a durational departure, a district court may only rely on factors bearing on the severity of the offense, and “not the characteristics of the offender.” *Solberg*, 882 N.W.2d at 623. The guidelines provide a nonexclusive list of aggravating and mitigating factors that make an offense more or less serious. Minn. Sent. Guidelines 2.D.3 (2016). Appellate decisions have recognized factors not listed in the guidelines. *Solberg*, 882 N.W.2d at 624. To identify the circumstances or factors that may support a sentencing departure, a sentencing court considers “the course of conduct underlying the charge for which the defendant is being sentenced.” *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

Here, the state argues that the district court abused its discretion in departing from a felony to a gross-misdemeanor sentence. *See State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994) (holding that imposing a gross-misdemeanor sentence for a felony conviction is a downward durational departure), *review denied* (Minn. Oct. 27, 1994). The state contends that Mwangi’s conduct “was not *significantly* less serious than the conduct in a typical solicitation-of-a-minor case.” The state requests that we reverse Mwangi’s sentence and remand to the district court to impose the presumptive guidelines sentence.

The district court determined that Mwangi's conduct was less serious than the typical offense for two reasons, one of which has been rejected by this court in a recent decision. In *State v. Dentz*, this court held that a district court abused its discretion in granting Dentz's motion for a downward durational departure because his offense was not significantly less serious than the typical offense. A18-0068, 2018 WL 4056019, at *5 (Minn. App. Aug. 27, 2018). Similar to Mwangi's case, Dentz responded to an online advertisement. Dentz agreed via text message to pay \$120 for anal sex with a minor. *Id.* at *1. The decoy responded that, although the advertisement stated that she was 18 years old, she was "not quite 18," but actually "15 and almost 16." *Id.* Dentz went to the agreed-upon location where he was arrested, carrying \$120. *Id.* Dentz pleaded guilty to the felony charge of soliciting a minor under 16 years old, whom he believed to be between 13 and 16 years of age, to engage in sexual contact, in violation of Minn. Stat. § 609.324, subd. 1(b)(3) (2016). *Id.*

In Dentz's case, the district court departed from the presumptive stayed sentence of 18 months, determining that Dentz's offense was less serious than the typical case because Dentz "solicited for what [he] thought was going to be consensual sex with an adult woman" and then "the person on the other end . . . interjected" that she was 15 years old. The district court stated that Dentz "still [went] forward" but "[t]hat's not the same thing for me as [Dentz] actively soliciting an underage female." *Id.* at *2.

We held that the district court improperly relied on the fact that Dentz did not initially intend to solicit a minor. That Dentz "did not initially intend to solicit a 13-16 year old initially does not change the fact that he ultimately solicited a minor to engage in

prostitution.” *Id.* at *3. We reversed and remanded to the district court to impose a sentence consistent with our opinion. *Id.* at *5.

In this case, the district court granted a downward departure, in part, after determining that Mwangi’s offense was less serious than the typical offense because “there’s no indication that [age] was key” to Mwangi. Based on *Dentz*, we conclude that the district court erred when it relied on this legally impermissible reason for granting a downward durational departure. *See Solberg*, 882 N.W.2d at 623.

But this does not end our analysis for two reasons. First, “a single mitigating factor, standing alone, may justify a downward durational departure.” *Id.* at 624-25. Second, if the district court relies on improper or insufficient reasons in granting a downward departure, we “may scrutinize the record to determine whether alternative grounds support the departure.” *Id.* at 623. Mwangi contends that additional circumstances support the district court’s determination that his offense is less serious than the typical offense. *See, e.g., State v. Rund*, 896 N.W.2d 527, 532-33 (Minn. 2017) (considering two alternative grounds for a downward departure that were not adopted by the district court).

We begin by examining the range of conduct described in section 609.324, which prohibits hiring minors for prostitution, as well as prostitution in public places, and other prostitution offenses. Previous caselaw has concluded that a defendant’s conduct may be deemed more or less serious than a typical offense based on individual circumstances in light of the offense described in a criminal statute. *See, e.g., Bauerly*, 520 N.W.2d at 763 (considering range of monetary values stated in theft statute and upholding downward departure where amount of theft was “more than \$500 below the midrange”); *State v. Felix*,

410 N.W.2d 398, 401 (Minn. App. 1987) (considering definition of great bodily harm as provided in first-degree assault statute and upholding upward departure where defendant's conduct did not "simply involve" one factor described in the statute but "*all of them*"), *review denied* (Minn. Sept. 29, 1987).

A conviction for soliciting sexual contact from an individual 18 years of age or older is a misdemeanor. Minn. Stat. § 609.324, subd. 3(2) (2016). In Mwangi's case, the police posted an advertisement on Backpage.com that described a 19-year-old male; thus, the advertised conduct was a misdemeanor. The penalties under section 609.324 increase depending on the age of the individual solicited, with the harshest penalty for soliciting sexual contact with an individual under the age of 13 years. Minn. Stat. § 609.325, subd. 1(a) (2016).

Keeping in mind this statutory scheme, we consider an initial difference between Mwangi's and Dentz's courses of conduct: Mwangi agreed to a sexual act with a 17-year-old minor, and Dentz agreed to a sexual act with a 15-year-old minor. The convictions for the charges brought against both Mwangi and Dentz are felonies, but the legislature has authorized a more severe punishment for Dentz's offense. Minn. Stat. § 609.324, subd. 1(b)(3) (punishable by not more than ten years imprisonment); Minn. Stat. § 609.324, subd. 1(c)(3) (punishable by not more than five years imprisonment). As a result, Mwangi was convicted of a severity-level three offense and Dentz was convicted of a severity-level five offense. Minn. Sent. Guidelines 5A (2016).

To be clear, we are not suggesting that convictions for offenses that receive lesser penalties within a statutory scheme present a mitigating factor warranting consideration for

a downward departure. By graduating punishments according to severity of conduct, the legislature already has accounted for varying levels of seriousness and has authorized maximum sentences consistent with severity. But the lesser severity of Mwangi's offense within the statutory scheme for solicitation offenses provides some context for his course of conduct. Two circumstances about Mwangi's conduct stand out.

First, Mwangi initially did not respond to the text message that the decoy was 17 years old, and Mwangi "doubted the authenticity of the ad" and wanted a photograph before he met the decoy. Unlike Mwangi, there was no evidence that Dentz hesitated after he learned that the decoy was 15 years old. Here, the district court did not identify Mwangi's hesitation as a reason for departure, but the district court found that Mwangi was "worried about age" and found that the decoy "had to indicate age as 17 twice before [Mwangi] even responded to age."¹

Second, Mwangi arrived at the meeting place with only \$5 of the \$50 he had agreed to pay, whereas Dentz arrived carrying exactly the \$120 he promised to pay. The state points out that Mwangi also was carrying a gift card and argues that "it is not uncommon at all to see someone who does not bring sufficient funds that they agreed upon and then

¹ The dissent rejects evidence of Mwangi's hesitation as irrelevant because he entered into an agreement for sexual contact with a minor and ultimately showed up. We disagree with this reasoning for two reasons. First, it fails to defer to the district court's factual findings, which are supported by the record. *See Solberg*, 882 N.W.2d at 626 (recognizing that the district court "sits with a unique perspective on all stages of a case, including sentencing, and . . . is in the best position to evaluate the offender's conduct" (quotation omitted)). Second, the dissent implies that any hesitation was Mwangi's "intent at an earlier time." But applicable precedent states that, in determining whether to depart, a district court should consider the defendant's entire course of conduct in committing the offense. *Cox*, 343 N.W.2d at 642.

wish to negotiate.” The record establishes that Mwangi had a gift card in his possession but contains no information on the gift card’s value. Also, the state’s argument that this “is not uncommon” is unsupported by any evidence or citation. More importantly, we are not persuaded by an argument that evidence in the record might support a different finding than that made by the district court. A finding underlying a reason for departure need only be supported by the record. *See State v. Heath*, 685 N.W.2d 48, 57 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).²

Thus, two circumstances make Mwangi’s course of conduct significantly less serious than the typical offense: Mwangi hesitated before agreeing to sexual contact with the decoy, and Mwangi arrived at the meeting place with only \$5 instead of the \$50 he had agreed to pay. Binding precedent establishes that the presence of these mitigating facts does not “obligate” the district court to depart downward. *See State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). We “generally will not interfere” with a trial court’s decision to depart. *Id.* And, where there is sufficient evidence in the record to justify a departure, the departure will be affirmed. *See Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). Thus, we conclude the district court did not abuse its discretion in granting Mwangi’s motion for a downward durational departure.

² Mwangi’s attorney argued at the sentencing hearing that the absence of harm to a victim also was a reason for departure. Caselaw establishes that a single mitigating factor, if substantial and compelling, is sufficient to support a sentencing departure. *Solberg*, 882 N.W.2d at 624-25. Because we conclude that the sentencing departure in Mwangi’s case was sufficiently supported by two mitigating circumstances, we do not consider or decide whether the absence of harm to a victim was a sufficient reason for departure in this case.

The state makes three additional arguments, which we address in turn. First, the state urges this court to reverse because Mwangi’s conduct “falls squarely within the statute’s prohibition.” This is a truism and not convincing. Every conviction falls squarely within the statute’s prohibition when the evidence is sufficient or the guilty plea is accurate. Yet, Minnesota law authorizes sentencing departures in some cases. The state mistakenly relies on two supreme court decisions that rejected downward sentencing departures and discussed whether the defendant’s conduct “fits squarely” within a statute’s prohibition. In doing so, the supreme court rejected reasoning that claimed the conduct was less serious than the typical offense because the supposed mitigating conduct was expressly prohibited by the statute. *See, e.g., Solberg*, 882 N.W.2d at 627 (rejecting use of coercion as a mitigating factor); *Rund*, 896 N.W.2d at 533-34 (rejecting reckless disregard as a mitigating factor). In contrast, Mwangi’s case presents individual circumstances—his hesitation in response to the decoy’s texts and his possession of less cash than promised—that mitigate the seriousness of the solicitation offense. Unlike the arguments rejected in *Solberg* and *Rund*, neither of the mitigating circumstances in Mwangi’s case is expressly prohibited by the statute.

Second, the state cites three district court sentencing decisions in which a guidelines sentence was imposed for a minor-solicitation offense. The state argues these cases establish that Mwangi’s offense is typical. We are not persuaded because a small number of cases does not provide a solid basis for determining a typical offense under a new statute. The legislature adopted the solicitation statute in August 2015. Minn. Stat. § 609.324, subd. 1(c)(3); 2015 Minn. Laws ch. 65, art. 6, § 11, at 527-28. Until our decision in *Dentz*, no

appellate court had issued any opinion with regard to the solicitation offense that Mwangi committed. The recent adoption of this statute, along with a paucity of reported decisions, suggests that what is a typical minor-solicitation offense is best left to the district courts.

Last, the state contends that the district court improperly relied on offender-based factors to support the durational departure. The district court mentioned offender-based factors during the sentencing hearing in response to the parties' arguments. But after reading these comments in context, we conclude that the district court granted a downward departure based on offense-based factors.

Based on the record before the district court, we conclude that the district court did not abuse its discretion in imposing a gross-misdemeanor sentence after determining that Mwangi's course of conduct was significantly less serious than the typical offense.

Affirmed.

SMITH, TRACY M., Judge (dissenting)

I respectfully dissent. In my view, appellant Mwangi’s crime is not significantly less serious than the typical solicitation-of-a-16-or-17-year-old offense and the district court lacked a substantial and compelling reason to durationally depart from the presumptive guidelines sentence.

In concluding that Mwangi’s crime was less serious than the typical offense of this nature, the district court cited two offense-related factors: (1) that Mwangi’s crime was “less onerous than someone who is looking for a young partner”; and (2) that Mwangi arrived at the meet location with only \$5 in cash, and not the agreed-upon \$50, and thus “did not have enough funds to follow through.”³ The majority cites an additional reason to support the departure: (3) that Mwangi hesitated after the decoy communicated that he was 17 years old. Finally, while not identifying it as a departure factor, the majority concludes that it is important context that, under Minn. Stat. § 609.324, subd. 1(c)(3) (2016), soliciting a 17-year-old child is a less serious offense than soliciting a younger child.⁴

³ As the majority notes, Mwangi argued at sentencing that his offense was significantly less serious than the typical offense because it involved a sting operation and not a real victim. The district court did not adopt this argument.

⁴ The district court at sentencing also discussed its belief that Mwangi’s “deep-held religious beliefs” made it “difficult, if not impossible, for you to face the activity you truly desired in this case” and stated, “So, I’m going to take everything together and understanding that and allow that in total, the *Trog* factors would favor a departure. Again, I acknowledge those are dispositional departure bases, but there is case law that allows it to be used for durational.” Because this is a durational-departure case, our discussion is properly limited to offense-related factors. See *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

A district court may depart from the guidelines' presumptive sentences only when there are substantial and compelling circumstances justifying a departure. Minn. Sent. Guidelines 2.D.1.c (2016) (stating that a departure must be supported by "substantial and compelling circumstances"); *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Because the guidelines' goal is to create uniformity in sentencing, departures are justified only in exceptional cases." *Solberg*, 882 N.W.2d at 625. For a downward durational departure, "[s]ubstantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* . . . less serious than that typically involved in the commission of the crime in question.'" *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quoting *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002)).

The guidelines provide a nonexclusive list of mitigating factors that make an offense less serious. Minn. Sent. Guidelines 2.D.3(a). And appellate courts have recognized mitigating factors not listed in the guidelines. See *Solberg*, 882 N.W.2d at 624. But, regardless of which factor a court chooses to rely on, the substantive question of law that must be resolved is whether that factor establishes that the defendant's crime is significantly less serious than typical. This determination follows a "qualitative assessment of the record" and "must be based on [appellate courts'] collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts." *Rairdon v. State*, 557 N.W.2d 318, 327-28 (Minn. 1996) (quotation omitted).

The question here is whether the factors asserted in this case, while not listed in the guidelines, are adequate to make Mwangi's crime significantly less serious than the typical solicitation-of-a-minor offense. See *State v. Dentz*, ___ N.W.2d ___, ___, 2018 WL

4056019, at *2 (Minn. App. Aug. 27, 2018) (explaining that a reviewing court’s first task is to determine whether the reason for departure is “proper or adequate”). In my view, they are not.

Factors (1) and (3)

As recognized by the majority, the factor that Mwangi was not initially seeking a minor is insufficient under our recently published decision in *Dentz*, which held that, when a person solicits a minor to engage in prostitution, “the fact that the person did not initially intend to solicit a minor is not a proper reason for a downward durational sentencing departure.” *Dentz*, 2018 WL 4056019, at *1 (syllabus).

I do not believe that any hesitance on Mwangi’s part materially distinguishes this case from *Dentz* or constitutes a factor making Mwangi’s crime significantly less serious.⁵ In response to the decoy’s texts that he was 17 years old, Mwangi reportedly texted, “But can I get a face pic first. I’m feeling skeptical. coz of your age . . . please.” When the decoy said no, Mwangi reportedly texted, “Ok. Can I see your dick pic?” Subsequent text messages confirmed the meeting, and Mwangi showed up at the designated location. *Dentz* evaluates the typicality of the offense by considering the defendant’s intent at the time that the defendant agreed to pay the minor for sex, not his intent at an earlier time. *Dentz*, 2018

⁵ Mwangi does not assert hesitance as a basis to depart and thus does not provide authority for the proposition that hesitance is an offense-based, and not an offender-based, factor. I assume for purposes of this discussion that it is an offense-based factor.

WL 4056019, at *3. That Mwangi might at first have been “skeptical”⁶ does not affect the typicality of the crime at the time he agreed to pay a child for sex.

Factor (2)

Nor does the fact that Mwangi arrived at the meet location with only \$5 rather than the agreed-upon \$50 in cash make his earlier agreement to solicit a child significantly less serious. In my view, this fact does not support a finding that Mwangi did not intend to follow through with the agreed-upon sexual conduct. The fact that Mwangi actually showed up to meet a child who was unknown to him, following an agreement to pay him for sexual contact, strongly indicates his intent to follow through with the sexual contact, regardless of whether he intended to pay him the agreed-upon amount for it. Moreover, reliance on the \$5 alone ignores the gift card that Mwangi also had on his person.

Context of the statutory scheme

Finally, I disagree that the fact that the solicitation statute punishes a range of conduct, and that Mwangi believed he was soliciting a 17-year-old child and not a younger

⁶ The district court found that Mwangi “was worried about age at one point,” but it is unclear to me that Mwangi’s text that he was “skeptical” meant that he was worried about age. The record provides little basis for ascertaining Mwangi’s meaning. Mwangi did not address this text at the plea hearing or the sentencing hearing, and the psychosexual-evaluation report provides no explanation from Mwangi about the text. According to the PSI and psychosexual-evaluation report, Mwangi denied seeking to hire anyone, a child or an adult, to engage in sexual contact; rather, he claimed he was looking for someone to give him a massage or to examine bumps on his penis. Mwangi denied knowing what the terms “bj” and “dick” meant, although he used them in his texts to the decoy. He also asserted that he did not understand the significance of the person being under the age of 18. The district court at sentencing found Mwangi’s assertions that his conduct was not for sexual purposes noncredible, which casts doubt on his version of events. Also, it is unclear to me why a person who is reluctant to solicit a minor would ask for a photo when that person has been actually informed that he is communicating with a minor.

child, provides a context that supports a downward durational departure. By graduating punishment according to the age of the person solicited, the legislature has already accounted for the varying levels of seriousness in prostitution-related crimes. See Minn. Stat. § 609.324, subds. 1, 2, 3, 6, 7 (2016). Thus, although Mwangi’s conduct may have been less serious than that at issue in *Dentz*, the defendant in *Dentz* was convicted of a different and more severe crime. *Dentz*, 2018 WL 4056019, at *1. I do not think that this difference can be used to support a determination that Mwangi’s conduct was less serious than typical for the offense he was convicted of.

Nor do I think that the downward-departure case of *State v. Bauerly*, 520 N.W.2d 760 (Minn. 1994) supports a different conclusion. In *Bauerly*, we affirmed a downward durational departure when the defendant’s theft was barely more than \$500 and the range of monetary value for severity-level-three theft extended from \$500 to \$2,500. *Id.* at 763. We concluded that Bauerly’s severity-level-three offense was significantly less serious than the typical severity-level-three-theft offense because the legislature had determined that theft of \$500 constituted a felony and her theft was “more than \$500 below the mid-range for a Severity Level III theft.” *Id.* Here, there is no analogous broad range of conduct within the severity-level-three offense of soliciting a 16- or 17-year-old child. And I do not think that *Bauerly* stands for the proposition that a departure is warranted simply because an offense is a lower severity level than another offense within the same statutory scheme.

The more applicable cases regarding the significance of the statutory scheme are the supreme court’s decisions in *Solberg* and *State v. Rund*, 896 N.W.2d 527 (Minn. 2017). In

Solberg, the supreme court rejected the argument that the use of coercion, rather than force, made the defendant's sexual assault significantly less serious when the statute identified both of those means of compelling sexual penetration within the definition of third-degree sexual assault. 882 N.W.2d at 626-27. Similarly, in *Rund*, the supreme court rejected the argument that reckless disregard rather than a purposeful intent made the defendant's terroristic threats significantly less serious when the statute identified both of those types of mental states within the definition of terroristic threats. 896 N.W.2d at 534. In both cases, the conduct "fit[] squarely within the statute's prohibition." *Id.*; *Solberg*, 882 N.W.2d at 627. Here, the specific statutory provision under which Mwangi was convicted prohibits solicitation of a 16- or 17-year-old child. See Minn. Stat. § 609.324, subd. 1(c)(3). Thus, relative to the age of the person solicited, Mwangi's solicitation of a 17-year-old child fits squarely within the statute's prohibition.

The sentencing guidelines "were created to assure uniformity, proportionality, rationality, and predictability in sentencing." *Misquadace*, 644 N.W.2d at 68 (citing Minn. Stat. § 244.09, subd. 5(2) (2000)). Thus, departures "are discouraged and are intended to apply to a small number of cases." *Solberg*, 882 N.W.2d at 623. In my view, this case is not the exceptional case warranting a downward durational departure. See *id.* at 625 (stating that "departures are justified only in exceptional cases"). I would reverse the district court and remand for resentencing in accordance with the guidelines' presumptive sentence.