

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0823**

State of Minnesota,  
Respondent,

vs.

Kevin Scott Smith,  
Appellant.

**Filed April 29, 2019  
Affirmed  
Johnson, Judge**

McLeod County District Court  
File No. 43-CR-17-1246

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael K. Junge, McLeod County Attorney, Daniel R. Provencher, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Richard L. Swanson, Chaska, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and John P. Smith, Judge.\*

---

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

## **UNPUBLISHED OPINION**

**JOHNSON**, Judge

A McLeod County jury found Kevin Scott Smith guilty of third-degree assault based on evidence that he twice punched his wife in the face. We conclude that the evidence is sufficient to prove beyond a reasonable doubt that Smith did not act in self-defense. We also conclude that the district court did not err by denying Smith's motion for a downward durational departure. Therefore, we affirm.

### **FACTS**

The state charged Smith with third-degree assault, in violation of Minn. Stat. § 609.223, subd. 1 (2016), based on an incident that occurred on the evening of August 4, 2017, at his home in the city of Glencoe. The case was tried to a jury on two days in January and February of 2018. The state called six witnesses. The state's primary witness was Smith's estranged wife, K.S., who previously had moved out of the house where Smith was residing into a house across the street. She testified as follows.

K.S. was married to Smith but, in August 2017, she moved out of the house they shared because Smith had verbally and physically abused her. She and Smith have an 11-year-old son. She also has an adult son, J.H., from a prior relationship. On the date in question, she attended a festival in the city of Silver Lake with J.H. and his daughter, her granddaughter. K.S. became "very drunk." J.H. drove her home between 9:00 and 11:00 p.m. After she returned to her house, she noticed that her younger son had returned from a trip and was at Smith's house. She walked across the street and entered Smith's house, uninvited. She and Smith started to argue, and Smith told her to leave. The argument

turned physical, and Smith punched her in the face twice, causing her to fall backward into a window. She did not hit or jump on Smith at any point. She left Smith's house and walked into the street, bleeding from her nose and mouth. She later went back to Smith's house when she heard him and J.H. fighting. She stepped in between J.H. and Smith, attempting to break up the fight. She does not remember whether she was hit by either Smith or J.H. while they were fighting. She left Smith's house again and called 911.

J.H. testified that he went outside after he heard yelling at Smith's house. After he saw K.S.'s injuries, he entered Smith's house and confronted him. He and Smith fought. J.H. does not remember whether K.S. stepped in between him and Smith to break up the fight. Officer Johnson testified that he responded to K.S.'s 911 call. K.S. appeared to be injured. K.S. told him that Smith had punched her twice. An emergency-room nurse who treated K.S. testified that she suffered a broken nose and a broken palate. While at the hospital, K.S.'s alcohol concentration was 0.265.

Smith testified in his own defense, as follows. K.S. entered his house uninvited while he was lying on a couch. Without warning, K.S. lay on top of him. He asked K.S. to leave. She became angry and grabbed his neck. K.S. went to the kitchen to get a beer, and Smith followed her. He did not punch her. But he "might have hit her" when he tried to grab a beer can away from her while she held it close to her mouth. Smith did not call any other witnesses and did not introduce any other evidence relevant to the alleged assault.

Smith requested that the district court give the jury an instruction on the defenses of self-defense and authorized use of force while resisting a trespass. The district court did so. The jury returned a verdict of guilty.

Before sentencing, Smith moved for a downward durational departure. At the sentencing hearing, Smith argued that a departure was justified by his remorse. The district court denied the motion on the ground that there were not a substantial or compelling reason to depart. The district court stayed the imposition of a sentence and placed Smith on probation for three years. Smith appeals.

## **D E C I S I O N**

### **I. Sufficiency of Evidence**

Smith first challenges the sufficiency of the evidence of his guilt. For purposes of the appeal, he does not contend that the evidence is insufficient to prove that he assaulted K.S. Rather, he contends that the state's evidence does not prove beyond a reasonable doubt that he did not act in self-defense.

When reviewing the sufficiency of the evidence for a conviction, this court undertakes “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). This court “must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). This court will “not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

A person is guilty of third-degree assault if he “assaults another and inflicts substantial bodily harm.” Minn. Stat. § 609.223, subd. 1. In general, a person is justified in assaulting another person in self-defense if four circumstances are present:

- (1) the absence of aggression or provocation by the defendant,
- (2) the defendant’s actual and honest belief that he or another was in imminent danger of death or great bodily harm, (3) the existence of reasonable grounds for the belief, and (4) the absence of a reasonable possibility of retreat to avoid danger.

*State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017); *see also* Minn. Stat. § 609.06, subd. 1(3) (2016). But if the assault occurs in one’s home, there is no duty to retreat. *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001). At trial, the defendant bears the burden of introducing evidence to support a claim of self-defense. *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). If the defendant has introduced such evidence, “the state has the burden of disproving one or more of these elements beyond a reasonable doubt.” *Id.*

In this case, the jury rejected Smith’s claim of self-defense. On appeal, Smith contends that he was threatened because K.S. entered his home without permission, was drunk, did not leave when he asked her to leave, and “attacked” him by grabbing him around the neck. Smith asserts that “[a]ny reasonable person would conclude [he] was in danger of a continued physical attack from” K.S. We construe Smith’s argument to question whether the state disproved the second and third requirements of the self-defense doctrine, which asks whether he had an “actual and honest belief that he or another was in imminent danger of death or great bodily harm” and whether he had “reasonable grounds for the belief.” *See Zumberge*, 888 N.W.2d at 694.

Because we “must assume the jury believed the state’s witnesses and disbelieved any evidence to the contrary,” *Caldwell*, 803 N.W.2d at 384, we do not credit Smith’s evidence that K.S. attacked him. K.S. denied that she hit Smith or grabbed his neck. More importantly, Smith never testified that he felt that he was in danger when K.S. was in his home, let alone imminent danger of death or great bodily harm. *See State v. Soukup*, 656 N.W.2d 424, 432 (Minn. App. 2003).

Thus, the evidence in the record is sufficient to prove beyond a reasonable doubt that Smith did not act in self-defense when he committed third-degree assault.

## **II. Downward Durational Departure**

Smith also argues that the district court erred by denying his motion for a downward durational departure.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2017). For any particular offense, the presumptive sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent. Guidelines 1.B.13 (2017). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2017); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “Substantial and compelling circumstances are those demonstrating that the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotations

omitted). The guidelines provide non-exclusive lists of mitigating and aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3 (2017). If a district court departs from the presumptive sentence, the district court is required to state the reason or reasons for the departure. Minn. Sent. Guidelines 2.D.1.c (2017). But if the district court does not depart, the district court is not required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

If a mitigating or aggravating circumstance is present, the district court must “deliberately consider[] circumstances for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). Accordingly, this court generally applies an abuse-of-discretion standard of review to a district court’s denial of a defendant’s motion for a downward durational departure. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). But if no mitigating or aggravating factors are present, a district court has no discretion to depart from the sentencing guidelines. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999); *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only a “rare case” will warrant reversal of a district court’s refusal to depart from the sentencing guidelines. *Kindem*, 313 N.W.2d at 7; *see also State v. Solberg*, 882 N.W.2d 618, 623-24 (Minn. 2016).

In this case, the district court denied Smith’s motion on the ground that there are no substantial or compelling reasons to depart from the presumptive sentence. On appeal, he contends that a downward durational departure is justified by his remorse. In general, durational departures are based on the nature of the offense, while dispositional departures

are based on the characteristics of the offender. *Solberg*, 882 N.W.2d at 623. Accordingly, a defendant's remorse typically is relevant to a downward *dispositional* departure, not a downward *durational* departure. *Id.* at 625. Remorse conceivably could justify a downward durational departure but

only if a defendant's remorse . . . bears on a determination of the cruelty or seriousness of the conduct on which the conviction was based. In other words, unless a defendant can show that his demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction, remorse cannot justify a downward *durational* departure.

*Id.* at 626 (citation omitted). The supreme court has cautioned, "showing the relevance of remorse to a durational departure will not be an easy task." *Id.*

The record in this case is lacking any indication that Smith is remorseful. Smith did not testify at trial that he has remorse. Even at sentencing, he did not express remorse. When the district court asked Smith whether he had anything to say in allocution before the conclusion of the sentencing hearing, he said, "Nothing, Your Honor." In denying Smith's motion, the district court stated that it was "concerned about [his] failure to take responsibility for [his] actions" and about his "blaming the victim." The district court also stated, "Nowhere in the PSI do you take responsibility for your actions, and you continue to indicate . . . that it was her fault." In short, the record does not support Smith's contention that he is remorseful.

Thus, the district court did not err by denying Smith's motion for a downward durational departure.

**Affirmed.**