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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0005**

State of Minnesota,
Respondent,

vs.

Steven Wayne Culver,
Appellant.

**Filed June 3, 2019
Affirmed
Reilly, Judge**

Anoka County District Court
File No. 02-CR-17-620

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

Paul P. Sarratori, Mesenbourg & Sarratori, P.A., Coon Rapids, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and John Smith, Judge.*

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

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges the district court's denial of his downward dispositional-departure motion. Because the district court did not abuse its discretion, we affirm.

FACTS

Appellant Steven Wayne Culver married K.O. in 2004 and shortly thereafter adopted K.O.'s young child from a previous relationship, Z.C. After Culver and K.O. divorced in 2007, Culver continued to have regular parenting time with Z.C.

In June 2016, Z.C. disclosed ongoing sexual abuse perpetrated on him by Culver. The Anoka County Sheriff's Office opened an investigation and interviewed Z.C. regarding the alleged abuse. According to Z.C., the sex abuse began almost immediately following Culver and K.O.'s divorce approximately ten years prior. Culver sexually abused Z.C. during his parenting time. According to Z.C., the abuse occurred most frequently—approximately once a week—when Z.C. was five through seven years old. The incidents of abuse started by Culver tickling Z.C. on the floor or bed. Culver would then remove Z.C.'s pants or clothes and have anal sex with Z.C. Z.C. told officers that Culver regularly wore Trojan-brand condoms and ejaculated after intercourse. Z.C. also reported that he recently confided in a friend regarding the sex abuse.¹ During a search of Culver's apartment, police found a Trojan condom wrapper and other items of evidentiary value in Z.C.'s bedroom.

¹ Law enforcement spoke with the friend, and the friend confirmed that Z.C. disclosed sex abuse perpetrated on him by his adoptive father.

The state charged Culver with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2014), and subsequently filed a notice of intent to seek an aggravated sentence. Culver pleaded guilty to first-degree criminal sexual conduct and admitted to sexually abusing Z.C. approximately five to ten times over the nine-year period. As a condition of the plea, the state agreed to dismiss its motion for an aggravated sentence and agreed to a guidelines sentence of 144-172 months. The parties agreed Culver could argue for a downward dispositional departure.

During the sentencing hearing the state argued that Culver should be sentenced to 172 months in prison. Z.C., K.O., and Z.C.'s step-father gave victim-impact statements. Culver presented arguments for departure including a memorandum and a professional evaluation. Culver's father-in-law spoke briefly on behalf of Culver. After hearing the arguments for and against departure, the court determined that departure was not appropriate and imposed a 172-month sentence.

This appeal follows.

D E C I S I O N

The Minnesota Sentencing Guidelines promote uniformity, proportionality, and predictability in sentencing. *See* Minn. Stat. § 244.09, subd. 5(2) (2014). A district court must impose a presumptive sentence unless “identifiable, substantial, and compelling circumstances” justify a departure. Minn. Sent. Guidelines 2.D.1 (2014). When a district court decides to depart from the presumptive sentence, the court must articulate “substantial and compelling” circumstances justifying the departure. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). “Substantial and compelling circumstances are those

circumstances that make the facts of a particular case different from a typical case.” *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985).

One of the circumstances that supports a downward dispositional departure is a determination that a defendant is particularly amenable to probation. *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014). A court may consider a defendant’s age, prior record, remorse, cooperation, attitude in court, and the support of friends and family in determining whether he is particularly amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). However, a district court is not required to depart even when it finds that a defendant is particularly amenable to probation. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009) (“[T]he district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation, but it is not required to do so.”); *see also State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (determining that a district court need not depart in every case where a mitigating factor is present).

The decision whether to depart from the sentencing guidelines rests within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion. *See Hicks*, 864 N.W.2d at 156; *Pegel*, 795 N.W.2d at 253. Our review of a district court’s decision whether to impose a sentencing departure is “extremely deferential.” *Dillon v. State*, 781 N.W.2d 588, 595-96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). We will reverse a district court’s refusal to depart only in a “rare” case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

Culver argues that the district court erred when it denied his dispositional departure motion for multiple reasons. First, Culver argues that the court should have granted a

dispositional departure from the presumptive sentence based upon his amenability to probation, his mental health, the evidence that he may be victimized in prison, and the fact that he is a productive member of society.² Second, Culver argues that the court concentrated on the offense committed—which is appropriate when considering a durational departure—but failed to look at Culver as an individual, and therefore did not review the evidence that supported his dispositional departure motion.³

The record shows that the district court reviewed the factors for and against departure at the sentencing hearing and considered Culver as an individual. The district court acknowledged that Culver had been respectful, quiet, had not violated any conditions of release, and followed through with the meetings and examinations required of him. Nevertheless, the district court explained its decision not to depart—even though it was under no obligation to do so. *See e.g., State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (noting that even when departure factors exist, “an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence”). The district court considered Culver’s honesty regarding the allegations. For example, regarding the number of instances of sex abuse, the court noted:

In a very short time frame, you’ve said a number of different things. So on July 23rd, there was the plea: Less than 20, maybe more than ten, maybe more than five. On August 8th, you told the PSI writer that it was one time when [Z.C.]

² We note that the Minnesota Sentencing Guidelines prohibit the use of employment and social factors as reasons for departing from the presumptive sentence. Minn. Sent. Guidelines 2.D.2 (2014).

³ Unlike durational departures, which may be justified by offense-related reasons only, dispositional departures are based on a defendant’s characteristics. *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017).

was 14. Then later, maybe it was more than once, but it started when he was 12.

Additionally, the district court considered the pre-sentence investigation (PSI), which found that “the defendant shows a lack of acceptance of responsibility in that he has minimized the abuse he perpetrated on his son and the damage he has inflicted.” Ultimately, the district court did not find Culver to be particularly amenable to probation because Culver did not show any “insight into what impact this has on anyone else” or have “any acceptance of personal responsibility.”

After the district court thoughtfully considered the reasons for and against departure, it denied Culver’s motion and imposed a presumptive sentence in accordance with the Minnesota Sentencing Guidelines. Because the district court did not abuse its broad discretion when it determined that a departure was not warranted in this case, we affirm.

Affirmed.