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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0590**

State of Minnesota,
Respondent,

vs.

Chad Joseph Shaw,
Appellant.

**Filed February 3, 2020
Affirmed in part, reversed in part, and remanded
Bryan, Judge**

Crow Wing County District Court
File No. 18-CR-17-1917

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

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and
Bryan, Judge.

UNPUBLISHED OPINION

BRYAN, Judge

In this direct appeal from the judgment of conviction for multiple controlled-substance offenses, appellant raises the following three claims: (1) that the district court abused its

discretion by denying his motion for a downward dispositional sentencing departure; (2) that his conviction of fourth-degree sale must be reversed because the controlled substance at issue for that charge is not a Schedule I, II, or III substance, and therefore, its sale is not prohibited under the statute; and (3) that the district court erred by entering convictions for three offenses of which he was acquitted.

We affirm in part, reverse in part, and remand to the district court to correct the warrant of commitment to vacate convictions relating to counts three, six, seven, and eight.

FACTS

Respondent State of Minnesota charged appellant Chad Joseph Shaw by amended complaint with the following nine offenses: felony first-degree sale of a controlled substance (count one); felony second-degree possession of a controlled substance (count two); felony fourth-degree sale of a controlled substance (alprazolam) (count three); felony fifth-degree possession of a controlled substance (the state charged appellant with committing four separate fifth-degree possession offenses in counts four through seven); misdemeanor possession of a hypodermic needle (count eight); and petty misdemeanor possession of drug paraphernalia (count nine). Shaw exercised his right to a jury trial, and at the close of the state's case, Shaw moved for judgment of acquittal, focusing "specifically" on the possession of a hypodermic needle offense and two of the fifth-degree possession offenses. The state agreed that those three offenses should be "dismissed," and the district court granted Shaw's motion for judgment of acquittal on those offenses (counts six, seven, and eight). The jury found Shaw guilty of the remaining six offenses.

At sentencing, Shaw moved for a downward dispositional departure. The presentence investigation (PSI) report filed with the court reflects several prior criminal offenses, including multiple convictions for domestic assault, assault of an unborn child, endangering a child, and several convictions involving controlled substances. In addition, the PSI reflects that a stay of execution was previously revoked. The district court denied the departure motion and sentenced him to 75 months in prison on the first-degree sale offense (count one). The district court did not enter a conviction on the second-degree possession offense (count two). The warrant of commitment reflects that, despite the court's judgement of acquittal on counts six, seven, and eight, convictions were entered on these three offenses. The court entered convictions on the four remaining offenses (three, four, five, and nine). This appeal follows.

D E C I S I O N

I. Denial of Motion for Downward Departure

Shaw challenges the district court's denial of his motion for a downward dispositional departure from the otherwise applicable sentencing guidelines. We "afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). Appellate courts reverse departure decisions only in rare cases. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

The Minnesota Sentencing Guidelines prescribe “a sentence or range of sentences that is presumed to be appropriate.” *Soto*, 855 N.W.2d at 308 (quotation omitted). A district court may depart from the presumptive sentencing guidelines only if substantial and compelling circumstances are present. *Solberg*, 882 N.W.2d at 623. Substantial and compelling circumstances are those that make a case atypical. *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003).

A dispositional departure occurs when the district court orders a disposition other than that recommended in the sentencing guidelines. Minn. Sent. Guidelines 1.B.5.a (2016). A district court may impose a downward dispositional departure from a presumptive prison commitment if the defendant is particularly amenable to treatment in a probationary setting. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Factors relevant in determining whether a defendant is particularly amenable to treatment in a probationary setting include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Id.*

Shaw argues that the district court abused its discretion by denying his motion for a dispositional departure because his “prior record, prior success on probation, and medical conditions supported placing him on probation instead [of] sending him to prison.” We disagree. In denying Shaw’s motion for a dispositional departure, the district court found:

The presentence investigation does not provide the Court with any of the substantial and compelling reasons that would warrant [departing], nor do I believe the information that was submitted in the memorandum rise[s] to the level that warrants a level for substantial and compelling reason for a departure.

The record supports the district court’s decision. The PSI filed with the district court reflects several prior criminal offenses, including multiple convictions for domestic assault, assault of an unborn child, endangering a child, and several convictions involving controlled substances. In addition, the PSI reflects that a stay of execution was previously revoked. The district court carefully considered the evidence presented at the sentencing hearing and concluded that the information provided did not establish substantial and compelling reasons for a departure. Moreover, “even if there is evidence in the record that the defendant would be amenable to probation,” a district court is not required to depart from a presumptively executed prison sentence. *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009); *see also State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (“[T]he mere fact that a mitigating factor is present in a particular case does not obligate the court to place [a] defendant on probation” (quotation omitted)). The district court did not abuse its discretion by denying Shaw’s motion for a downward dispositional departure.

II. Conviction for Fourth-Degree Sale of a Controlled Substance (Count Three)

Shaw challenges his conviction of fourth-degree sale of a controlled substance (count three) in violation of Minn. Stat. § 152.024, subd. 1(1) (2016), for his possession of alprazolam with the intent to sell it. Under Minn. Stat. § 152.024, subd. 1(1), a person is guilty of controlled-substance crime in the fourth degree if he or she “sells one or more mixtures containing a controlled substance classified in Schedule I, II, or III, except marijuana or Tetrahydrocannabinols.” Alprazolam is not listed as a Schedule I, II, or III controlled substance; instead it is a Schedule IV controlled substance. *See Minn.*

Stat. § 152.02, subd. 5 (2016) (listing alprazolam as a schedule IV drug). The state acknowledges that “alprazolam” is listed as a Schedule IV controlled substance and “does not oppose [Shaw’s] request that [his] conviction for Count III” be reversed. We agree. Therefore, we reverse Shaw’s conviction of fourth-degree sale of a controlled substance and remand to the district court to vacate the conviction.

III. Convictions for Counts Six, Seven, and Eight

The district court granted Shaw’s motion for judgment of acquittal on three offenses (counts six, seven, and eight). On appeal, Shaw contends that the district court erred by entering convictions on these three counts. We agree. The warrant of commitment is “conclusive evidence of whether an offense has been formally adjudicated.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). Here, the warrant of commitment reflects that the district court inadvertently entered convictions on counts six, seven, and eight. The state agrees that Shaw should not have been convicted of these three offenses. Accordingly, we reverse Shaw’s convictions of counts six, seven, and eight, and remand for correction of the warrant of commitment. *See* Minn. R. Crim. P. 27.03, subd. 10 (providing that “[c]lerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court”).

Affirmed in part, reversed in part, and remanded.