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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0739**

State of Minnesota,
Respondent,

vs.

Tony Le,
Appellant.

**Filed February 24, 2020
Affirmed
Segal, Judge**

Hennepin County District Court
File No. 27-CR-17-24250

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica May Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Segal, Judge.

UNPUBLISHED OPINION

SEGAL, Judge

Appellant challenges the district court's denial of his motion for a downward durational departure, arguing that his 261-month prison sentence exaggerates his

criminality because his conduct was less serious than the typical second-degree-murder offense and more similar to third-degree murder. We affirm.

FACTS

On September 25, 2017, M.T. returned home from a party at approximately 3:00 a.m. She and her husband appellant Tony Le had been going through a difficult period in their marriage and she had recently told him she wanted a divorce. When she returned home, they began to argue about their marriage. Le lost control and became “very angry and jealous.” While M.T. was in the bathroom, Le retrieved an iPhone charging cord, went into the bathroom, approached M.T. from behind, wrapped the cord around her neck and strangled her to death. Le went to his sister’s house and later called the police. He met the police at his home and took them to the bathroom, where the police discovered M.T.’s body. Le told police that he and M.T. had gotten into a disagreement and he strangled her because he could not control himself. Le was read his *Miranda* rights and then gave a full confession.

Respondent State of Minnesota charged Le with second-degree murder. In January 2019, Le pleaded guilty. He admitted that on September 25, 2017, he and M.T. got into an argument and that he lost control and strangled her. He stated he did not plan to strangle her but, when he put the cord around her neck, he intended to kill her. The district court accepted the guilty plea.

The district court held a sentencing hearing. Based on Le’s criminal-history score of zero and an offense severity level of 11, the presumptive sentencing range was 261 to 367 months in prison. The probation officer who conducted the presentence investigation

(PSI) recommended that Le be sentenced to 367 months in prison. At the sentencing hearing, the district court heard victim impact statements from M.T.’s nephew, brother and sister. Her nephew and sister requested that Le be given the maximum sentence, and her brother asked that Le be given “an appropriate penalty for intentional murder.” The state ultimately indicated that it agreed with the recommendation in the PSI and asked the district court to impose a sentence near the top of the presumptive sentencing range.

Le moved for a downward durational departure. The district court received 16 letters in support of Le from family and friends, and heard a brief statement from Le. Defense counsel argued that Le should receive a downward durational departure because his conduct was less serious than the typical second-degree-murder offense and more comparable to third-degree murder or first-degree manslaughter. He requested that the district court sentence Le to 180 months in prison, the top of the presumptive sentencing range for third-degree murder. The district court denied the motion and sentenced Le to 261 months in prison, a bottom-of-the-box sentence for second-degree murder. This appeal follows.

D E C I S I O N

A guidelines sentence is presumed to be appropriate unless “identifiable, substantial, and compelling circumstances” justify a downward departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013); *see also* Minn. Sent. Guidelines 2.D.1 (2016). The sentencing court has “broad discretion” and an appellate court will only reverse a sentencing court’s refusal to depart in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We

generally will not disturb a presumptive sentence when “the record shows that the sentencing court carefully evaluated all the testimony and information presented” before imposing a sentence. *Johnson*, 831 N.W.2d at 925 (quotation omitted).

A district court may grant a downward durational departure “if the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). The appropriateness of a durational departure depends on the nature of the offense rather than offender-related factors. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998).

We review the district court’s refusal to depart from the sentencing guidelines for an abuse of discretion. *Id.* at 714. Le argues that the district court abused its discretion by imposing a guidelines sentence because his conduct was less serious than the typical second-degree-murder offense.¹ In determining whether an offense was less serious than a typical offense, the district court “must analyze the act as compared with other acts constituting the same offense.” *Id.* at 713 (quotation omitted). An individual is guilty of second-degree murder when he “causes the death of a human being with intent to effect the death of that person or another, but without premeditation.” Minn. Stat. § 609.19, subd. 1(1) (2016). Le argues that his conduct was less serious than the typical offense based on his “comparative lack of intent” in committing the offense.

¹ In addition to the brief filed by Le’s appellate counsel, Le filed a pro se supplemental brief, similarly arguing that Le was entitled to a downward durational departure.

During the sentencing hearing, the district court judge considered Le's argument and the 16 letters that were submitted on his behalf, but ultimately concluded, "I don't believe there [are] circumstances where I can justifiably sentence you to [third-degree] murder or manslaughter." The district court judge reasoned:

I don't know exactly what happened in that two minutes; that would have been for a jury to decide if that was the choice that you would have made. But I believe is that there was some undying love, which is the best thing in this world, that was surrounded by some of the things that sometimes come with love that aren't as good. Whatever it was, it was something involving some combination of greed, jealousy, possessiveness, anger, maybe rage. But in that two minutes, as you told me yourself, you took an iPhone charger and put it around [M.T.'s] neck and held it there until she died and that is what you intended to do.

This record reflects that the district court carefully evaluated the testimony and information presented before imposing the sentence. The information provided to the district court presented two differing portrayals of Le—the state and victim's family argued that he was a jealous and violent husband, while Le argued that he was a loving family man who lost control in the heat of the moment. Le also argued that his mental capacity had been diminished by an untreated stroke. Le, however, pleaded guilty to second-degree murder and admitted that when he wrapped the cord around M.T.'s neck he intended to cause her death. Third-degree murder, which he argues his offense is more similar to, occurs when an individual "*without* intent to effect the death of any person, causes the death of another." Minn. Stat. § 609.195(a) (2016) (emphasis added). Accordingly, the conduct he admitted in submitting his guilty plea is inconsistent with the offense of third-degree murder.

Further, this offense does not appear to be less serious than the “typical” second-degree murder. While Le and his wife may have been arguing, she had left the room and was in the bathroom when Le retrieved an iPhone charging cord, went into the bathroom, approached her from behind, wrapped the cord around her neck and strangled her to death. The record shows that he rendered no aid to try to revive his wife and called 911 only after he left the house and arrived at his sister’s home.

The district court, therefore, did not abuse its discretion by imposing the guidelines sentence.

Affirmed.