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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0881**

State of Minnesota,
Respondent,

vs.

Jason David Utto,
Appellant.

**Filed January 13, 2020
Affirmed
Larkin, Judge**

St. Louis County District Court
File No. 69HI-CR-17-362

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

Mark S. Rubin, St. Louis County Attorney, Tyler Kenefick, Assistant County Attorney,
Jeffrey M. Vlatkovich, Assistant County Attorney, Hibbing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this direct appeal from judgment of conviction for third-degree assault, appellant contends that the district court abused its discretion by denying his motion for a downward dispositional departure, asserting that he is particularly amenable to probation. We affirm.

FACTS

On May 17, 2017, respondent State of Minnesota charged appellant Jason David Utto with felony domestic assault, domestic assault by strangulation, and third-degree assault. The complaint alleged that, on May 11, 2017, Utto struck his wife in the face repeatedly, choked her, and pulled her off a toilet, which caused her to hit the back of her head on the toilet seat.

In September 2018, Utto pleaded guilty to third-degree assault. In exchange, the state agreed to dismiss the two other charges, to a sentence at the “low end” of the presumptive range, and that Utto would move for a downward dispositional departure at sentencing. The probation department conducted a presentence investigation (PSI) and reported that Utto had “a significant criminal history, including 12 prior felony charges” and that Utto “was on parole at the time of the offense.”

The sentencing hearing was initially scheduled for February 21, 2019, but Utto did not appear. Utto’s counsel informed the court that Utto’s car had broken down on the way to the hearing. The hearing was rescheduled for February 28, but Utto once again failed to appear. There was a concern that Utto may have been confused about which courthouse to go to, but the district court confirmed that Utto never checked in at the other courthouse.

The district court issued a warrant for Utto’s arrest and directed Utto’s counsel to advise Utto to turn himself in immediately. Utto did not turn himself in on the warrant. Instead, he appeared out of custody for the third sentencing hearing on March 21.

Utto moved for a downward dispositional departure, asserting that he was particularly amenable to probation. The district court denied the motion and sentenced Utto to a presumptive term of 29 months of imprisonment. In denying the motion, the district court reasoned that Utto had never been successful on probation, that the offense occurred while he was on parole, and that he had not turned himself in on the warrant. The district court acknowledged that Utto had made “considerable strides” since the offense—including that he had obtained employment and was caring for a newborn child—but stated that it could not “ignore the severity of the conduct” underlying the offense. Utto appeals.

D E C I S I O N

“The sentences provided in the [Minnesota Sentencing Guidelines] Grids are presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines 2.D.1 (2016). “[A] sentencing court can exercise its discretion to depart from the guidelines only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (citations and quotations omitted). “When factors that may justify departing from the presumptive sentence are present, a court must exercise its discretion and consider the factors.” *State v. Kier*, 678 N.W.2d 672, 677 (Minn. App. 2004), *review denied* (Minn. June 15, 2004). But we

generally will not interfere with a presumptive sentence, even if there are grounds that would justify a departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *Soto*, 855 N.W.2d at 307-08 (quotation omitted). “[A]s long as the record shows the [district] court carefully evaluated all the testimony and information presented [to it] before making a determination,” we will not interfere with the district court’s decision to impose a presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted).

When considering a dispositional departure, the district court focuses “more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). “[A] defendant’s *particular* amenability to individualized treatment in a probationary setting will justify departure” from a guidelines sentence. *Soto*, 855 N.W.2d at 308 (quotation omitted). The particular-amenability requirement “ensure[s] that the defendant’s amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Id.* at 309 (quotation omitted).

Relevant factors for determining whether the defendant is particularly amenable to probation include the defendant’s age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). However, a district court is not required to depart from the presumptive-sentence range

even if there is evidence in the record that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009).

Utto contends that the district court abused its discretion because it relied on the seriousness of the offense to deny a dispositional departure. He cites *State v. Solberg* and argues that the seriousness of the offense was not a proper consideration. 882 N.W.2d 618 (Minn. 2016). Although the Minnesota Supreme Court in *Solberg* stated that a dispositional departure “*typically* focuses on characteristics of the defendant,” *id.* at 623 (emphasis added), caselaw indicates that offense-related factors can provide a basis to deny a dispositional departure. *See, e.g., Soto*, 855 N.W.2d at 313 (concluding that the district court abused its discretion in granting a downward dispositional departure “[g]iven the brutality of the crime and the absence in the record of any substantial and compelling circumstances that distinguish Soto from other defendants” (quotation omitted)); *Pegel*, 795 N.W.2d at 254-55 (affirming denial of a dispositional departure based in part on the effect of the offense on the victim). Thus, the district court did not abuse its discretion by considering the seriousness of the offense.

Utto also contends that the district court failed to consider facts showing that he was particularly amenable to probation. He points to his acceptance of responsibility for his conduct, his remorse for the harm he caused his wife, his cooperation during the proceedings, his commitment to rehabilitation, and his success in the community on pretrial release for over one year. The district court recognized that Utto had made progress since

the offense, had maintained employment, and was caring for his newborn child.¹

Nevertheless, the district court explained:

[T]he reality is that . . . the PSI has said that you've never been successful on probation and that [this] offense occurred while you were on parole. The other thing that causes me a lot of pause, is that I issued a warrant[.] . . . [A]nd you didn't turn yourself in on that warrant and that . . . speaks volumes to me, Mr. Utto.

And so, given the findings in the Pre-Sentence Investigation . . . that you have not been amendable [sic], I'm going to deny the [m]otion for a departure

In sum, the record indicates that the district court considered the reasons for and against departure, reasonably concluded that Utto was not particularly amenable to probation, and imposed a presumptive prison sentence of 29 months. “In sentencing, district courts have a great deal of discretion. Rarely do we hold that it has been abused.” *Soto*, 855 N.W.2d at 305. This is not such a rare case.

Affirmed.

¹ We note that the Minnesota Sentencing Guidelines prohibit the district court from considering “occupation or impact of sentence on profession or occupation,” “employment history,” “employment at time of offense,” “employment at time of sentencing,” and other “[e]mployment factors” as reasons for departure. Minn. Sent. Guidelines 2.D.2.c (2016).